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Supreme Court, U.S.
FILED

01 179 JUN - 7 2001

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No.

IN THE

SUPREME COURT
OF THE UNITED STATES

CITY OF PASCO,
Petitioners,

v.

JANETTE HOPPER and SHARON RUPP,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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170 pp

QUESTION PRESENTED

A city manager, on a temporary basis, permits a local arts organization to display artwork along the city hall corridor, and in a display case. The manager removes nude, but not obscene, artwork, which is displayed during the program. The manager does not personally object to the artwork. The manager removes the artwork because of the presence of children in the corridor, because of employees complaining about the artwork, because of citizen complaints about the art, and because the administration is spending valuable time addressing the controversy.

Does the removal of the artwork, from city hall, during a temporary arts program, offend the U.S. Constitution first amendment?

STATEMENT PURSUANT TO RULE 29.6

The caption of the case contains the name of all parties to the proceeding. The Arts Council of the Mid-Columbia Region is no longer a party to the litigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, City of Pasco, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion, (per Van Sickle, D.J.) granting petitioner's summary judgment motion is unpublished. A copy of the district court's opinion is attached as Appendix, pages 1c to 44c. The court of appeals' opinion (per McKeown, C.J., joined by Browning, J. and partially joined and dissented to by Gould, J.) reversing is published at 241 F.3d 1067. A copy of the opinion is attached hereto as appendix, pages 1a through 100a. The court of appeals' order denying rehearing en banc is not published, but attached hereto in the appendix as page 1b.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on February 15, 2001, and denied rehearing en banc on April 4, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The conduct of the city manager is challenged on the basis of the United States Constitution First Amendment. The relevant portion of the amendment reads:

> "Congress shall make no law ... abridging the freedom of speech ... ."

STATEMENT OF THE CASE

Petitioner is a Washington city, which permitted a temporary arts program to be displayed in the city hall corridors. The city terminated the arts program, when controversial nude artwork was displayed. The district court held that the City of Pasco City Hall was not a public forum. The district court granted the City of Pasco summary judgment, ruling that reasonable grounds existed to remove the nude artwork, and to terminate the arts program. The Ninth Circuit reversed, holding that city hall was a public forum, and the city lacked grounds for removal of the artwork.

The court of appeals' holding merits this Court's review, because the holding raises significant

first amendment issues, which municipal corporations must frequently address. The Supreme Court has not directly addressed a case involving controversial artwork, in a public place of business. Nevertheless, the decision below conflicts with numerous decisions of this Court holding that public places of business are not public forums. The decision below conflicts with decisions of this Court, and of other circuits, holding that public buildings must be free from controversial distractions, the government may protect children from nudity, and citizens have a right to be free from the imposition of artwork upon them.

In 1994, Pasco remodeled a former school building and converted it into a new city hall. In an effort to decorate the bare walls of the new space, Gary Crutchfield, the city manager, and his administrative assistant, Kurt Luhrs, decided to allow an experimental program whereby local artists would be invited to display their work in the newly-remodeled building.

Because Crutchfield did not want city employees to devote time and energy administering this program, Luhrs sought assistance from the Arts

Council of Mid-Columbia Region, a private entity that promoted the arts. Luhrs' primary contact at the arts council was its director, Barbara Gurth. Luhrs and Gurth agreed that the arts council would locate the art and administer the program in exchange for a $500 quarterly fee.

During initial discussions, Luhrs made clear to Gurth that Pasco was concerned about generating controversy. Luhrs instructed Gurth that, in selecting art for the program, works of a "questionable nature" should not be displayed. Consistent with Pasco's concerns, Gurth sent a letter to artists who had expressed interest in the project and warned of the need to avoid controversial subject matter. In announcing the program to the arts community, Gurth suggested that controversy would destroy the project and that artists submitting work could expect to be censored if their work was controversial. According to Kurt Luhrs, Pasco had no expertise in art, and the arts council would ensure that artists presenting political or offensive art would not be invited to participate.

The first exhibit ran from August through October 1995, and the second ran from November 1995 through January 1996. The art displayed during these two exhibits generated very little controversy. Some works depicted nudity, but Gurth describes the nudity as "abstracted", and the works caused no genuine controversy.

Respondents Hopper and Rupp were invited to participate in the third exhibit, scheduled to run from February through April 1996. Luhrs testified that before the third exhibit, Gurth called to tell him she had not reviewed Hopper's work because she was out of town and that Luhrs might want to "check it out". The call prompted Luhrs to review Hopper's pieces when they arrived, although he had not reviewed any previous submissions. Hopper submitted prints showing a naked couple in varied scenes. Crutchfield and Luhrs refused to hang the prints.

Rupp submitted a sculpture titled alternatively "To the Democrats, Republicans, and Bi-partisans", or "Damn I'm Stuck", which depicted a woman's bare buttocks "mooning" the viewer. Although Crutchfield and Luhrs initially permitted Rupp's piece

to be displayed, complaints ultimately prompted Crutchfield to direct its removal.

Some viewed the sculpture as depicting the woman in a "sexual position" or as depicting a "sexual act"; others simply thought it "offensive and disgusting", or "derogatory to women". Citizens complained of the sculpture and the controversy soon reached the local newspaper. With the many complaints, Crutchfield became concerned about the display being in the view of children, as the children used the corridor for access to a gymnasium.

The Hopper prints were shown to several city hall employees in order to get their opinions. Several female employees found some of the prints "offensive" and "sexually suggestive". Neither Luhrs nor Crutchfield disagreed with any viewpoint expressed in the artwork of Hopper or Rupp. Neither gentleman personally objected to the nudity in the art.

The district court noted that courts are reluctant to find public buildings to be public forums, under first amendment jurisprudence, when operated in a proprietary manner. When someone enters city hall to pay a water bill, or secure a building permit, or the

like, he or she is not interested in discourse. The district court found that the city did not intentionally open any art gallery to the public as a place for expressive activity. Artists' participation was by invitation only, and invitation was based on content. Because city hall was a non-public forum, speech regulation needed only to satisfy the requirement of reasonableness. The district court noted that decisions have held that art, which is merely offensive and then only to certain groups, may be removed from a non-public forum for that reason alone. One decision has even held that art may be removed from a non-public forum simply because it is ugly. The presence of children standing alone is reason enough to relocate or remove the artwork at issue, based upon Supreme Court precedent, reasoned the district court. Citizens and other visitors, who come to city hall, have the right not to be subjected to "assault upon individual privacy". Freedom of speech must recognize, at least within limits, freedom not to listen.

The Ninth Circuit reasoned that a municipality intentionally opens an office building as a public forum, when the government inconsistently enforces

restrictions on use of the forum. The Ninth Circuit, essentially making findings of fact, determined the city had not, before the exclusion of Hopper's and Rupp's works, excluded any controversial artwork The district court noted that any purported earlier controversial artwork, either was not controversial, or did not rise to the level of controversy, to which the Hopper and Rupp work rose. Since the city opened a public forum, the Ninth Circuit noted that removal of the artwork must be justified by a compelling state interest. None of the city's reasons for excluding the artwork were compelling. Circuit judge Gould concurred in part, and dissented in part, writing that factual issues of Pasco's intent remained. Judge Gould dissented because the majority's ruling is unfair to and unworkable for cities within the Ninth Circuit and likely will discourage cities from experimenting with public art displays. Ultimately, the Ninth Circuit ruling will be more harmful for artists than permitting Pasco to have its day in court.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three

reasons. First, the Ninth Circuit's judgment directly conflicts with decisions of the Seventh Circuit and the First Circuit. Second, the Ninth Circuit decided an important question, concerning artwork in municipal buildings, which has not been directly settled by the Supreme Court. Third, the Ninth Circuit decided an important federal question in a way which conflicts with numerous Supreme Court decisions and principles.

I. The Decision Below Conflicts With Decisions Of The Seventh And First Circuits, On The Issue Of Whether A Public Building, Open To Artists, Becomes A Public Forum.

Under a factual setting more favorable to the artist, the Seventh Circuit, per J. Posner, ruled that the opening of an art gallery, in a state school, to faculty, students, and outside artists, did not turn the gallery into a public forum, for purposes of first amendment law. *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir. 1985). The college had no criteria for picking works to be exhibited in the gallery. The artwork was closer to the line of obscenity, although the work had artistic merit. Stained glass windows,

contributed by Piarowski, provoked complaints from students, cleaning women, and black clergymen. When Piarowski refused to remove the windows, the administration removed them.

The Seventh Circuit analyzed the case under the public forum test announced by this Court in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). Invitations to outsiders and the lack of set criteria were insufficient. Occasional use by outsiders was not enough to make a college art gallery a public forum.

In *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), an art instructor at a state university, after being invited to exhibit his paintings in a busy corridor, was made to remove them. The paintings were sexually explicit. Children used the corridor. The First Circuit found no violation of the first amendment.

II. The Ninth Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

Pasco cannot, by the record, show that may other municipalities wish to show art in their public buildings. Evidence of activities of other entities would be irrelevant, to the case at the trial level. FRE 401 and 402. Pasco and its attorneys, can inform this Court that they have been contacted by many local governments, after the publication of the circuit court's opinion. Municipalities express concern about the court's ruling. As noted by the dissent below, the Ninth Circuit's ruling will likely discourage cities from experimenting with public art displays, which ultimately will be more harmful for artists than a loss in this case.

The majority below recognizes that the result is, in certain ways, "an unfortunate one". The majority suggests the unfortunate result can be prevented by administering a public art display in "a consistent and clearly articulated manner".

Pasco does not believe a consistent and clearly-articulated program is possible. Art does not lend itself to the articulation of clear and/or consistent standards. Each individual is different, and sees and feels art in different ways. Art stirs the emotions,

rather than pricks the intellect. Art is not an objective picture, which can be measured by standards, but the creation of a feeling in stone or on canvas. Pablo Picasso once stated that art cannot be explained mathematically or scientifically.

Municipal planners and managers, especially in small cities like Pasco, do not have the time, resources, desire, inclination, or capability to formulate and implement a consistent and clearly-articulated arts program. Any distinctions drawn, in an arts program, would be subjective and would subject the municipal manager to ridicule by the arts intelligentsia. Any delineated standards, in an arts program, would create argument, and additional litigation, over where lines are drawn.

Arts are important in the life of the community. The showing of artwork in a public building should be encouraged. The Ninth Circuit ruling discourages art programs.

Artwork is not as important as sheltering the thousands, or as pressing as feeding the millions. Artwork may not be as important as saving the country from nuclear destruction. Nevertheless, the

arts are implicit in the nature of humanity. The Ninth Circuit decision conflicts with many principles announced by the Supreme Court. Nevertheless, this Court has not directly addressed whether opening a city hall, or any other public building, for an arts program, creates a public forum, for which decisions concerning the display are subject to strict scrutiny.

III. The Ninth Circuit Decided An Important Federal Question In A Way That Conflicts With Many Supreme Court Decisions.

The crux of this case involves the application of "public forum analysis" to an arts showing in a city hall. This Court crystallized the "public forum analysis" in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). The *Perry Education Association* Court determined that decisions, excluding expressive activity from public property open for use by the public as a place for expressive activity, constitutes a public forum, and is subject to strict scrutiny. On public property, not categorized as a public forum, decisions excluding expressive activity need only be reasonable.

The Ninth Circuit decision is contrary to this

Court's principles, under which a public building, operated in a proprietary manner, is usually not considered a public forum. *Krishna Society v. Lee*, 505 U.S. 672, 678 (1992); *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality).

The Ninth Circuit's decision conflicts with this Court's analysis, under which government intent is critical, and a publicly-owned building does not become a public forum by accident. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. *United States v. Kokinda*, 497 U.S. 720 (1990); *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 802 (1985). The Ninth Circuit ruling below stands for the proposition that a public forum is created by haphazard exclusion of expressive activity. Haphazard conduct is not intentional conduct. Negligence or gross negligence does not constitute intent.

The Ninth Circuit's ruling conflicts with Supreme Court precedent concerning how to determine the intention of a municipality. This Court

has identified three primary factors to consider in determining whether the government intended to create a designated public forum: (1) what the government said; (2) what the government did; and (3) the compatibility of the space with the expression. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 47 (1983). The majority below did not consider each of these factors in light of the correct summary judgment standard. The intent of a governmental unit is generally a factual question, where summary judgment is improper. *Perry v. Sinderman*, 408 U.S. 593, 598 (1972).

The Ninth Circuit decision ignores this Court's teaching that a child's accessability to a forum is relevant. The Ninth Circuit gave no importance to the fact that children would pass, in the corridors, the nude artwork of Hopper and Rupp. The presence of children standing alone is reason enough to relocate or remove artwork. *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2341-42 (1997); *Board of Education, Island Trees etc. v. Pico*, 547 U.S. 853, 871 (1982) (plurality); *FCC v. Pacifica Foundation*,

438 U.S. 726, 749-50 (1978).

City manager Gary Crutchfield removed the artwork, since public employees and citizens conducting business in city hall, a captive audience, strenuously objected to the works. Justice William O. Douglas wrote:

> In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view, the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (plurality) (Douglas J., concurring) (citation omitted).

CONCLUSION

For the foregoing reasons, Pasco's petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 31, 2001

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 98-35795

CT/AG#: CV-97-00137-FLV

JANETTE HOPPER; SHARON RUPP

Plaintiffs - Appellants

v.

CITY OF PASCO

Defendant - Appellee

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED.

Filed and entered - 2/15/01.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 98-35795

D.C. No. CV-97-137-FVS

OPINION

JANETTE HOPPER, and SHARON Rupp,

Plaintiffs-Appellants,

V.

CITY OF PASCO, and ARTS COUNCIL OF THE MID-COLUMBIA REGION,

Defendants-Appellees.

Appeal from the United States District Court

for the Eastern District of Washington

Fred Van Sickle, District Judge, Presiding

Argued and Submitted

March 9, 2000~Seattle, Washington

Filed February 15, 2001

Before: James R. Browning, M. Margaret McKeown, and Ronald M. Gould, Circuit Judges.

Opinion by Judge McKeown; Partial Concurrence and Partial Dissent by Judge Gould

SUMMARY

Individual Rights/Freedom of Speech

The court of appeals reversed judgments of the district court. The court held that a city violates an artist's First Amendment rights when it creates a designated public forum and then excludes the artist's artwork without a compelling governmental interest.

In 1994, Gary Crutchfield, the City Manager of the City of Pasco, Washington invited local artists to display their art in the hallways of Pasco's City Hall. Crutchfield and his administrative assistant, Kurt Luhrs commissioned the Arts Council, a private organization to manage the program.

Crutchfield and Luhrs sought to avoid controversy in the program. In a letter to the Council, Luhrs reiterated that he did not want the City Hall Gallery used to display "offensive or politically motivated art" as the controversy might jeopardize the program. The

Council's initial notice to announce the arts program and invite submissions reflected Luhr's concerns, stating that submitted art would be screened for content, that the subject matter must be acceptable to a public arts program, and reiterating Luhr's concerns for avoiding public controversy.

Despite these admonitions, the arts program was run without any pre-screening process, and the city provided no further definition or guidance as to what kind of work would be considered inappropriate. There was no selection process to monitor quality, content, or controversy. The Council rejected no artwork during the entire length of the program, which included three separate exhibits. Nor did the City review works prior to their placement in the gallery. Instead, the artist simply provided a list of works to be included and signed a contract with the Council agreeing to leave the works up for the length of the exhibit and to give the Council a commission on any pieces sold.

The first two exhibits were not without controversy. One particular sculpture, referred to as "Starving Man," received a number of complaints but was not

removed. The first two exhibits also included works containing nudity; there were no complaints and no efforts to exclude the works from the exhibition.

Appellants Janette Hopper and Sharon Rupp were independently solicited by the Council to display their art in the third exhibit at the City Hall Gallery. Neither received the initial notice announcing the program. They each signed the agreement with the Council.

Rupp agreed to show three pieces, including one sculpture depicting a nude, headless woman, lying against a flat surface, her naked backside facing the viewer. All three works were displayed for a week. Luhrs received complaints about the sculpture soon after it was displayed and ordered the Council to remove all three pieces.

Hopper had agreed to show a series of prints depicting a naked couple in a variety of landscapes. Luhrs examined the prints before they were displayed and determined that some of them were potentially controversial or political. He decided not to display them. Luhrs had not reviewed all of the works previously displayed in the gallery. Shortly after the

works were excluded, Crutchfield terminated the arts program.

Hopper and Rupp filed an action in federal court, alleging that the City of Pasco had violated their First Amendment rights. The district court granted summary judgment for the City and denied Hopper and Rupp's motion for partial summary judgment, holding that Pasco City Hall was a non-public forum, and that Pasco's decision to exclude their art works was reasonable.

Hopper and Rupp appealed.

[1] The extent to which the Government may limit access for speech on government property depends on whether the forum is public or nonpublic. If the forum is public, speakers can be excluded only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. If the forum is non-public, the government may restrict access as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.

[2] A designated public forum exists where the government intentionally opens up a nontraditional forum for public discourse. Restrictions on expressive activity in designated public fora are subject to strict scrutiny.

[3] If a forum is a limited public forum, the reasonableness test is applied.

[4] Government intent is the essential question in determining whether a designated public forum has been established. The United States Supreme Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

[5] Abstract policy statements purporting to restrict access to a forum are not enough. What matters is whether the government consistently enforces the restrictions on use of the forum that it adopted.

[6] A policy purporting to keep a forum closed is no policy at all for purposes of public forum analysis

if, in practice, it is not enforced or if exceptions are haphazardly permitted.

[7] The City's so-called policy of non-controversy became no policy at all because it was not consistently enforced and because it lacked any definite standards. Prior to the exclusion of Hopper's and Rupp's works, the City neither pre-screened submitted works, nor exercised its asserted right to exclude works. Controversial artwork was exhibited despite complaints. The City retained no substantive control over the content of the arts program. The Council also undertook no screening and affirmatively solicited the purportedly controversial works of Hopper and Rupp. The City opened its halls to expressive activity and thereby created a designated public forum in the art gallery. Because the City's decision to exclude the works by Hooper and Rupp was unjustified by any compelling state interest, the district court erred in granting summary judgment to Pasco.

[8] None of the City's reasons for excluding the artwork were compelling. The mere fact that the works caused controversy was patently insufficient to

justify their suppression. The city conceded that the works were not obscene, and the works had serious artistic value.

[9] Pasco's "controversialness" standard for disapproval of works in the exhibition failed the narrow tailoring requirement because it did not adequately limit the discretion of the City in approving or disapproving the proposals. Hopper and Rupp's First Amendment rights were violated by the exclusion of their works from the Pasco City Hall Gallery. The district court erred in denying their motion for partial summary judgment.

[10] The City could only be held liable if the acts in question were undertaken pursuant to official policy or custom.

[11] A municipality may not be held liable on a respondeat superior theory for the unconstitutional acts of its employees.

[12] Because the art program was not the product of any formal policy or longstanding practice, Hopper and Rupp had to show either that Crutchfield was a final policymaker with respect to the arts program or that the City ratified his decision to exclude the

works. Remand was required as to this issue.

Judge Gould concurred in part and dissented in part, writing he dissented because factual issues of Pasco's intent remained, the Supreme Court precedent dictated a different rule regarding the creation of a designated public forum in light of the summary judgment standard, and the court of appeals should wait for development of a full factual record before creating a new rule

COUNSEL

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OPINION

McKEOWN, Circuit Judge:

This case is a study in the politics and law of public art. Janette Hopper and Sharon Rupp are artists whose works were excluded from public display at the Pasco City Hall Gallery in Pasco, Washington, because city officials deemed their art too "controversial." As the district court put it: "The gist

of the case is that plaintiffs were invited to display their work at city hall, and then summarily disinvited when their submissions provoked controversy." The parties agree that the art is not obscene or pornographic. Instead, the case boils down to a matter of taste and perception. Hopper and Rupp filed suit against the City of Pasco ("Pasco") under 42 U.S.C. § 1983 for violation of their First Amendment rights. The district court granted Pasco's motion for summary judgment, and denied Hopper and Rupp's motion for partial summary judgment, holding that the city hall is a non-public forum and that Pasco's decision to exclude their works was reasonable.[1]

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[1]The artists also pled a cause of action for breach of contract against the Arts Council of the Mid-Columbia Region ("Arts Council"), the local artists' association hired t~ coordinate the display of works at Pasco City Hall. After granting Pasco's motion for summary judgment on the federal claim, the district court declined to exercise supplemental jurisdiction over the breach of contract claim.

We hold that Pasco violated the artists' First Amendment rights by creating a designated public forum and then excluding their artwork without a compelling governmental interest. Therefore, we reverse the district court's grant of summary judgment for Pasco, reverse the district court's denial of Hopper and Rupp's motion for partial summary judgment, and remand for further proceedings.

I. BACKGROUND AND PROCEDURAL HISTORY

In 1994, Pasco remodeled an abandoned school building to create a new city hall. Faced with an expanse of barren walls, Gary Crutchfield, the City Manager, and his administrative assistant, Kurt Luhrs, decided to invite local artists to display their works in the public hallways. Rather than expend limited resources to have the city administer an arts program, Crutch-field and Luhrs commissioned the Arts Council, a private organization, to manage the program for $500 a quarter, for at least one year. According to their agreement, each quarter the Arts Council would make arrangements to exhibit artwork, provide hanging supplies, design and mount the exhibit, publish and mail a flyer to announce the

exhibit, and issue press notices.[2] If the program proved successful, Crutchfield planned to seek permanent funding from the City Council.

At the outset, Luhrs and Crutchfield sought to avoid controversy. Indeed, an uncontroversial program was a prerequisite, in their view, to eventually obtaining permanent funding from the City Council. Luhrs made this clear in the following letter to Barbara Gurth, Director of the Arts Council:

> Following our conversation this morning, I felt it was important to provide you with some assurances regarding the city's commitment to developing an art gallery in the new city hall. The City Manager and I are very excited about this program and feel that it will certainly benefit Pasco residents as well as regional artists.

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[2]The initial funds came from Crutchfield's discretionary account for the maintenance of city hall.

In order to develop a broad base of support, we felt it would be advantageous to present a "demonstration project" for the council and citizens to appreciate. This would be the most effective way to garner the support needed for an annual or long term commitment, prior to bringing the issue into the public forum at a council meeting. The logic being that if you can see what we are talking about, you can appreciate the value of it to the community as a whole.

During our conversation I got the impression that your board felt that our approach may not be a commitment to the long term management of such a project. This is far from the case. Both Gary and I feel that this approach will ensure support when we bring this item to council in a public meeting. *Personally, my greatest fear is bringing such a program to council and having various citizens with a conservative "bent" raise issues that have caused trouble for the*

National Endowment for the Arts, i.e. offensive or politically motivated art. Through our discussions, I feel assured that the Arts Council will not use the City Hall Gallery as a venue for controversy. Nevertheless, without a demonstration, I feel that the ungrounded fears of a few citizens would ruin this great opportunity for introducing the arts to our citizens.

In conclusion, please assure your board that the City of Pasco is very interested in a long term relationship. We are willing to pay for the reasonable costs to plan and develop this show on its own, should the cost exceed the average $500 per quarter.

(Emphasis added).

Likewise, in an initial notice to announce the arts program and to invite submissions, Gurth repeated Luhrs' admonition:

Requirements for acceptance: Artworks will not be jured [sic] in the usual sense, but all works will be screened for content and professional presentation.

...

Subject matter: Wide open, but with the restraints that would be accepted with a public arts project paid for with public money. To offer a quote from a city official's letter regarding this project ". . . my greatest fear is . . . having various citizens . . . raise issues that have caused trouble for the National Endowment for the Arts, i.e., offensive or politically motivated art. Through our discussions I feel assured that the Arts Council will not use the City Hall Gallery as a venue for controversy."

Indeed, the Arts Council will not. We have worked for five years to bring the cities on board for the arts, we will not jeopardize our progress. Additionally, I do not think that regional art in this area presents a problem in

> this regard, but the Council will reserve the right to reject a subject matter that the committee feels may present a problem for a conservative public sector. . .

(Emphasis added).

Despite these admonitions, the arts program was run without any pre-screening process, and the city provided no further definition or guidance as to what kind of work would be considered inappropriate. There was no selection process to monitor quality, content, or controversy. As a result, the Arts Council rejected no artwork during the entire length of the program, which included three separate exhibits that ran from October 1995 through March 1996. According to Gurth's deposition testimony:

> Gurth: We didn't select the artists. We did not pass any qualitative judgment on anybody, or the work, either. We just simply said: These are the people who have agreed to hang this month and we can take this many. So it wasn't a selection process. It wasn't a jurying process at all.

Q: How did you decide who would be, for lack of a better word, chosen, as opposed to selected like a jury process?

Gurth: They chose themselves. This is a small area and there aren't that many practicing artists that work. So the question with this project from its inception was always how long will we sustain it . . . . So it was never a question of selecting anybody. It was just simply these people coming forward and saying we would like to hang this month and we took them. .

Q: Did Mr. Luhrs give you a definition or an understanding at this particular point of what he considered to be objectionable art?

Gurth: No, we never discussed that.

Nor did the city review works prior to their placement in the gallery. Instead, the artist simply provided a list of works to be included and signed a contract with the Arts Council agreeing to leave the works up for the

full three months of the exhibit and to give the Arts Council a twenty percent commission on any pieces purchased.

Although it is undisputed that no one pre-screened or otherwise rejected art prior to the exclusion of the works by Hopper and Rupp, there is conflicting evidence as to the reason for failure to pre-screen. Gurth testified that it "was always understood" that the city had the ultimate say as to what kind of art would be displayed. But Crutchfield assumed the Arts Council would screen for content, and Luhrs testified that he expected and trusted Gurth to make sure that no "offensive or politically-motivated art" would be shown because "she knew the artists in the region and she knew who to invite and who not to invite."

The first two exhibits (by artists other than Hopper and Rupp) were well received, but not without controversy. One piece, a large sculpture referred to alternately as "After the Famine" and "Starving Man," received a number of complaints but was not removed. The sculpture depicted an emaciated, "dark complected" man and was placed in front of the Housing and Support Services Office. One of the

employees who worked in that office complained that a starving man "didn't send a good message," and wanted it removed. Others thought it was ugly, and in a newspaper article Luhrs stated that "Some people saw racial issues, some saw gender issues, some just didn't think it was art." Although Luhrs brought the complaints to Crutchfield's attention, the piece remained for the full length of the exhibit. The first two exhibits also included works containing nudity, although there were apparently no complaints and certainly no efforts to exclude the works from the exhibition.

Unlike most of the artists who provided works for the Pasco City Hall Gallery, neither Hopper nor Rupp received the initial notice sent by Gurth. Rather, both were independently solicited by the Arts Council to display their art in the third exhibit, which ran from February to April 1996. Each signed the standard contract with the Arts Council.

Rupp agreed to show three small bronze sculptures. The first, entitled "Working it Out," depicts a woman struggling with a large box on her head. The second sculpture, entitled "Orchid" or "Retaliation," is a floral

piece. Her third sculpture, which was the source of the controversy, is entitled "To the Democrats, Republicans and Bipartisans," "Damn, I'm Stuck," or "A Woman Drinking from A Brook." It depicts a large, nude, headless woman, either lying or standing against a flat surface.[3] Her naked back side faces the viewer. All three works were displayed in a glass case on the main floor of City Hall for a single week in February 1996.

Hopper also signed a contract for the third exhibit, agreeing to show a series of ten linoleum prints entitled "Adam and Eve." The prints depicted a naked couple (in silhouette and outline form) in a variety of landscapes and scenes from post-World War II Germany. Although none of the prints depict explicit sexual activity, in two the couple is kissing, and in several they are embracing. At the time she was contacted about displaying her work, Hopper

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[3]It is unclear from the record whether the statue was displayed horizontally, in which case the woman would appear to be lying down, or vertically, in which case she would seem to be standing.

informed a representative of the Arts Council that her work contained nudity. The representative assured her that nudity would not be a problem, however, given that previous exhibitions at the gallery contained nudity. Two of the rejected pieces were also on display at the Portland Art Museum.

Both artists' works caused controversy. Luhrs received complaints about "To the Democrats, Republicans and Bipartisans" soon after the display went up. Some viewed the sculpture as depicting the woman in a sexual position" or as depicting a "sexual act;" others simply thought it "offensive and disgusting," or "derogatory to women." After discussing the matter with Crutchfield, Luhrs ordered the Arts Council to remove all three sculptures from the display case. In a letter sent shortly after the incident, Luhrs told Rupp:

> The city's art gallery project is a voluntary effort on the part of the City of Pasco to provide a venue for artists to display their work. Our city administration firmly believes that this program is a great service to our

> community and to the arts community in general. Nevertheless, we are somewhat limited in the subject matter which we can display. We firmly believe that this program should remain out of the political realm. Displaying art which could be misconstrued by activists as *"sexual"* or *"prurient,"* will make the decision whether to maintain the program a political one, thereby endangering the entire program. For this reason we must be sensitive to art work presented for the entire program. This process should have occurred prior to your committing your art to the display.

(emphasis in original).

Hopper's prints were never even displayed. After Hopper delivered her prints, but prior to their hanging, Luhrs examined them and determined that some were potentially controversial or political because the couple was depicted nude in public, and public nudity is illegal in Pasco. Over the next few days he showed

the prints to several City Hall employees in order to get their opinions. The employees found some of the prints "offensive" and "sexually suggestive." In view of these assessments, Luhrs and Crutchfield decided not to display any of the prints, and Hopper received the same letter Luhrs had sent to Rupp.[4]

Luhrs acknowledged that the prior exhibits included works containing nudity. When asked to explain the apparent inconsistency in displaying those works in the Gallery but barring Rupp and Hopper's works, Luhrs shrugged it off, saying that he did not review all of the previous works.

Shortly after the works were excluded from the Gallery, Crutchfield terminated the arts program altogether, and Hopper and Rupp filed this action. On cross-motions for summary judgment, the district

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[4] In a meeting with Hopper and Rupp in which they asked the city to reconsider its decision, Luhrs offered to display Hopper's prints on the second floor of the building in a hallway "where there's very little traffic . . . not . . . a lot of public traffic." Hopper rejected the offer.

court held that Pasco City Hall is a nonpublic forum, and that Hopper and Rupp produced no evidence that the city intentionally created a forum for public expression by creating the Gallery. The court placed special emphasis on the city's expressed desire to avoid controversial works as proof that it did not intend to open its halls indiscriminately to public expression. Thus, although the court agreed that "[when it came to execution . . . the expectation of 'invitation only' turned into a come-one-come-all affair," it reasoned that Pasco's failure to screen the art did not belie its stated intent to restrict access. The court declined to decide whether the arts program was the product of a municipal policy for the purpose of establishing Pasco's liability under *Monell V. Department of Social Services,* 436 U.S. *658* (1978).

II. STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *See Robi V. Reed,* 173 F.3d 736, 739 (9th Cir. 1999), *cert. denied,* 528 U.S. *952* (1999). Our review is governed by the same standard applied by the trial court under Federal Rule of Civil Procedure *56(c).*

Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

III. ANALYSIS

A. First Amendment Violation

1. *Categories of Fora*

[1] The Supreme Court instructs us that, in assessing a First Amendment claim for speech on government property, "we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius V. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 797 *(1985).* If the forum is public, "speakers can be excluded... only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* at 800. If, on the other hand, the forum is non-public, the government is free to restrict access "as long as the

restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' *Id.* (quoting *Perry Educ. Ass 'n V. Perry Local Educators' Ass 'n*, 460 U.S. 37, 46 (1983)).

[2] Thus, the two main categories of fora are public (where strict scrutiny applies) and non-public (where a more lenient "reasonableness" standard governs). This does not, however, exhaust the universe of categories. Rather, "Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora."[5]

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[5]The "public fora" to which the Ninth Circuit refers here are "traditional public fora," which the Supreme Court has described as "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" *Cornelius, 473* U.S. at 802 (quoting *Perry,* 460 U.S. at 45). This category includes public streets and parks. *See id.* This case does not involve such a traditional public forum.

DiLoreto V. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 964 (9th Cir. 1999), cert. denied, 120 S.Ct. 1674 (2000) (quoting *Children of the Rosary V. City of Phoenix,* 154 F.3d 972, 976 (9th Cir. 1998)). A designated public forum exists where "the government intentionally opens up a nontraditional forum for public discourse." *Id.* "Restrictions on expressive activity in designated public fora are subject to the same limitations that govern a traditional public forum," *i.e.*, strict scrutiny. *Id.* at 964-965 (citing *International Soc 'y for Krishna Consciousness V. Lee,* 505 U.S. 672, 678 (1992)).

The designated public forum has been the source of much confusion. As this court has put it, with considerable understatement, "The contours of the terms 'designated public forum' and 'limited public forum' have not always been clear." *DiLoreto*, 196 F.3d at 965 n.4. Some courts and commentators refer to a "designated public forum" as a "limited public forum" and use the terms interchangeably. But they

are not the same, at least not in this circuit.[6] Rather, a limited public forum is a sub-category of a designated public forum that "refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." *Id.* at 965.[7] "In a limited public forum, restrictions that are

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[6]*See, e.g.*, Sheri M. Danz, *Note, A Nonpublic Forum or A Brutal Bureaucracy? Advocates' Claims of Access to Welfare Center Waiting Rooms, 75* N.Y.U. L. Rev. 1004, 1031 n.151 (2000) ("While the [Supreme] Court seems to use the terms 'designated public forum' and 'limited public forum' interchangeably, lower courts and commentators distinguish these concepts.").

[7]*See also New York Magazine V. Metro. Transp. Auth.*, 136 F.3d 123, 128 n.2 (2d Cir. 1998) ("The Second Circuit has referred to the 'limited public forum' as a sub-category of the designated public forum, where the government 'opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.' Exclusions of speech under this category are treated the same as exclusions under non-public fora:

viewpoint neutral and reasonable in light of the purpose served by the forum are permissible." *Id.* (citing *Rosenberger V. Rector & Visitors of the Univ. of Virginia, 515* U.S. 819, 829 *(1995); Lamb's Chapel V. Center Moriches Union Free Sch.,* 508 U.S. 384, 392-93 (1993)).

[3] In other words, the fact that the government has opened a nonpublic forum to expressive activity does not determine whether we must apply strict scrutiny or the lower reasonableness standard. Rather, we must examine the terms on which the forum operates to determine whether it is a designated public forum or a limited public forum. If a forum is a "designated public forum," we apply strict scrutiny. But if it is merely a "limited public forum," then we apply the reasonableness test. *See DiLoreto 196 F.3d at 965.*

'[They] need only be reasonable and view point neutral to pass constitutional muster.' " (citations omitted)).

("[F]irst we must determine whether the fence was a designated public forum subject to a reasonableness standard.").[8]

2. ***Designated Public Forum Versus Limited Public Forum***

Here, then, our initial task is to determine whether the Pasco City Hall Gallery constituted a designated public forum or a limited public forum. If we classify the Gallery as a designated public forum, we must decide whether the city's decision to exclude plaintiffs' works was justified by a compelling interest. If, on the other hand, we determine that the Gallery is a limited public forum, we need only decide whether the exclusion was reasonable and viewpoint-neutral.

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[8]This categorization admittedly leads to the strange semantic result that a limited public forum is *not* actually a public forum. Therefore, in our analysis here, when we refer to a "public forum" (where strict scrutiny applies), we are referring to a designated public forum (where strict scrutiny applies), but *not* to a limited public forum (where the reasonableness test applies).

[4] As the Supreme Court observed in *Cornelius*, government intent is the essential question in determining whether a designated public forum has been established:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional public forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

473 U.S. at 802 (emphasis added) (citing *Perry*, 460 U.S. at 46).

[5] The "policy" and "practice" inquiries are intimately linked in the sense that an abstract policy

statement purporting to restrict access to a forum is not enough. What matters is what the government actually does - specifically, whether it consistently enforces the restrictions on use of the forum that it adopted. Thus in *Cornelius,* where the Court held that a federal fundraising drive was not a designated public forum, the Court emphasized both the existence of a policy and its consistent application:

> The Government's consistent policy has been to limit participation in the [fundraising drive] to "appropriate" voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials. Although the record does not show how many organizations have been denied permission throughout the 24-year history of the [fundraising drive], there is no evidence suggesting that the granting of the requisite permission is merely ministerial. The Civil Service Commission

> developed extensive admission criteria to limit access to the Campaign to those organizations considered appropriate. Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.

473 U.S. at 804-05 (citations omitted); *see also Perry,* 460 U.S. at 47 (no designated public forum in a public school's internal mail system where the regular practice was to require permission from the individual school principal before access to the system was granted, and where permission had not been granted "as a matter of course to all who [sought] to distribute material"); *Lehman V. City of Shaker Heights,* 418 U.S. 298, 302-304 (1974) (no designated public forum in advertising space on city buses where a city management contract required control over subject matter of displays, and such control was consistently exercised for more than twenty-five years); *Children of the Rosary V. City of Phoenix,* 154 F.3d 972, 976 (9th Cir. 1998) ("[A]

review of the city's standards and practices indicates that the city has not opened a public forum [for ads on its bus panels]. The city has consistently restricted political and religious advertising"; upholding the exclusion of a religious anti-abortion ad), *cert. denied*, 526 U.S. 1131 (1999).[9]

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[9]Conversely, an explicit policy *opening* a forum suited to expressive activity is often taken at face value. *See Widmar V. Vincent, 454* U.S. 263, 267 (1981) (clear intent to create public forum where state university had an explicit policy of making meeting facilities available to registered student groups); *Madison Joint School Dist. No.8 V. Wisconsin Empl. Relations Comm'n*, 429 U.S. 167, 174 n.6 (1976) (state statute providing for open school board meetings creates forum for citizen participation); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. *546, 555* (1975) (city-leased theater designed and dedicated to expressive activity is a public forum).

[6] Thus, consistency in application is the hallmark of any policy designed to preserve the non-public status of a forum. A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted. *See Grace Bible Fellowship, Inc. V. Maine Sch. Admin. Dist. No.* 5, 941 F.2d 45, 47 (1st Cir. 1991) (in public forum analysis, "actual practice speaks louder than words").

Christ's Bride Ministries, Inc. V. SEPTA, 148 F.3d 242 (3d Cir. 1998), *cert. denied, 525* U.S. 1068 (1999), is especially instructive in this regard. There, the Third Circuit considered a regional transit authority's decision to remove a poster ad stating that "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer." *Id.*, 148 F.3d at 244. The ad was removed when the transit authority received a letter in which the Assistant Secretary of Health in the United States Department of Health and Human

Services stated that the ad was misleading and did not accurately reflect the weight of scientific evidence. *See id.* at 245. The contract for the ad provided that the transit authority reserved the right to remove any ads it deemed "objectionable." *Id.* at 250-51. The court nevertheless rejected the transit authority's argument that, "because it retained the sole discretion to reject or to remove any advertisement that it deems objectionable, it did not create a public forum of any sort" in transit system advertising space. *Id.* at 251.

The court reached this conclusion after a careful review of the transit authority's past practice with respect to advertising, noting that it had accepted "a broad range of advertisements for display," ranging from religious and political messages to explicit ads regarding safe sex, abstinence, and AIDS. *Id.* The transit authority had even allowed two ads favoring abortion rights. *Id.*at 251-52. On only three prior occasions had the transit authority requested advertisers to modify their ads. *Id.* at 252. At least in

part because of the transit authority's "practice of permitting virtually unlimited access to the forum," the court held that the ad space qualified as a designated public forum. *Id.* Indeed, the court held that the transit authority's long practice of allowing ads on controversial subjects "as a 'matter of course,'" *id.* at 254, trumped the general rule that no public forum is created when the government requires speakers to obtain permission before engaging in expressive activity in the forum. *Id.* at 252-55.

The *Christ's Bride* court followed a Seventh Circuit decision reaching a similar conclusion with respect to advertising space managed by Chicago's transit authority. In *Planned Parenthood Ass 'n V. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985), the transit authority refused to lease ad space to Planned Parenthood for abortion-related displays. Other than a "general contractual directive . . to refuse vulgar, immoral, or disreputable advertising," the court found that the transit authority maintained no policy or system of control over the ads it

accepted and that it "ha[d] allowed its advertising space to be used for a wide variety of commercial, public-service, public-issue, and political ads." 767 F.2d at 1232-33. Under these circumstances, the court held that the advertising space was a designated public forum. Other courts have held likewise. *See, e.g., United Food & Commercial Workers Union Local J099 V. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 353 (6th Cir. 1998) (following *Christ's Bride* and noting that "[w]e . . . must closely examine whether in practice [the transit authority] has consistently enforced its written policy in order to satisfy ourselves that [its] stated policy represents its actual policy"); *Air Line Pilots Ass'n Int'l V. Dept. of Aviation,* 45 F.3d 1144, 1153 (7th Cir. *1995)* ("The government may not 'create' a policy to implement its newly-discovered desire to suppress a particular message. *Neither may the government invoke an otherwise unenforced policy to justify that suppression.* Therefore, the government's stated policy, without more, is not dispositive with respect

to the government's intent in a given forum.") (emphasis added) (citations omitted).

Courts have also been reluctant to accept policies based on subjective or overly general criteria. "'[S]tandards for inclusion and exclusion' in a limited public forum 'must be unambiguous and definite' if the 'concept of a designated public forum is to retain any vitality whatever.' *"Christ's Bride,* 148 F.3d at 251 (quoting *Gregoire v. Centennial Sch. Distr.,* 907 F.2d 1366, 1375 (3d Cir. 1990). Absent objective standards, government officials may use their discretion to interpret the policy as a pretext for censorship. *See Board of Educ. v. Mergens,* 496 U.S. 226, 244-45 (1990) (generalized definition of permissible content poses risk of arbitrary application); *Putnam Pit, Inc. v. City of Cookeville,* 221 F. 3d 834, 845-46 (6th Cir. 2000) ("broad discretion [given] to city officials [raises] possibility of discriminatory application of the policy based on viewpoint"); *Cinevision Corp. v. City of Burbank,* 745 F.2d at 560 (9th Cir. 1984) (vague standard has

"potential for abuse"); *Gregoire,* 907 F.2d at 1374-75 ("virtually unlimited discretion" granted to city officials raises danger of arbitrary application); *see also City of Lakewood v. Plain Dealer Publ. Co.,* 486 U.S. 750, 758-59 (1988) (absence of express standards in licensing context raises dual threat of biased administration of policy and self-censorship by licensees). Therefore, "the more subjective the standard used, the more likely that the category will not meet the requirements of the first amendment." *Cinevision,* 745 F.2d at 575; *see also Christ's Bride,* 148 F.3d at 251 (suppression of speech under defective standard requires closer scrutiny).

In addition to these factors, courts examine the selectivity with which the forum was open to particular forms of expression. In general, the more restrictive the criteria for admission and the more administrative control over access, the less likely a forum will be deemed public. *See Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 679 (1998) (distinguishing the government's decision to

"make[] its property generally available to a certain class of speakers [from a situation] when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it") (internal quotations and citation omitted); *Cinevision Corp. V. City of Burbank,* 745 F.2d 560, 570 (9th Cir. 1984) ("[B]y granting [a private promoter] access to the [municipal amphitheater] for the presentation of music by a variety of performers, the City transformed publicly owned property into a public forum for expressive activity, even if the expressive activity is promoted by a single entity.").

Finally, courts consider whether the expressive activity is consistent with the principal function of the forum. *Cornelius,* 473 U.S. at 804. This inquiry focuses on the specific space to which the would-be speaker seeks access, but should also take into account the context of the property as a whole. *DiLoreto,* 196 F.3d at 968.

It is undisputed that Pasco opened its display space to expressive activity by retaining the Arts Council to manage a gallery with exhibitions by local artists. This evinces an intent to create a designated public forum. Pasco argues, however, that its stated policy-memorialized in the agreement with the Arts Council-demonstrates that it did not intend to establish a public forum, but only to display noncontroversial art. Put otherwise, the city contends that it opened only a limited (rather than a designated) public forum. This argument is unpersuasive.

[7] The city's so-called policy of non-controversy became no policy at all because it was not consistently enforced and because it lacked any definite standards. Prior to the exclusion of the works at issue here, the city neither pre-screened submitted works, nor exercised its asserted right to exclude works. Indeed, controversial artwork was exhibited despite complaints from citizens and employees. Given the undisputed facts in the record concerning

the selection and screening process for art to be displayed at City Hall (or, rather, the lack thereof), we conclude that the city retained no substantive control over the content of the arts program. Both Luhrs and Crutchfield testified that they left content screening to the Arts Council, and Luhrs' letter to Gurth confirms that he expected her to ensure the propriety of the exhibits. The record is clear that the Arts Council itself undertook no screening and, that it affirmatively solicited the purportedly controversial works at issue here. Combined with the fact that the city established no specific criteria for exclusion of art from the program, we are bound to conclude that the city opened its halls to expressive activity and thereby created a designated public forum in the art gallery. Because the city's decision to exclude the works by Hooper and Rupp was unjustified by any compelling state interest (a subject discussed more fully at section III(a)(3) *infra),* we conclude that the district court erred in granting summary judgment to Pasco.

Turning to the artists' cross-motion for partial summary judgment, we are obliged to view the evidence in the light most favorable to the city. We must therefore assume that, as a matter of policy, Pasco expressly retained a "final say," or discretion to exclude "controversial" works, and that, at least at the outset, Crutchfield and Luhrs intended the exhibit to be limited to uncontroversial works (whatever that may mean). Pasco argues that this proves that it did not intend to create a public forum, or alternatively, that any forum created was expressly limited to uncontroversial art.[10] Under the authorities discussed above, however, Pasco cannot hide behind its "policy" if that policy is inconsistent with the city's actual practice. Under the facts presented, we find inconsistency as a matter of law.

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[10]Similarly, the dissent claims that we downplay the significance of the "intent" requirement in *Cornelius*. But the dissent's focus on outstanding factual issues and the need to focus on "intent" ignores

Certain facts are undisputed. First, the city concedes that it exerted little or no substantive control over the selection and content of the art work displayed at City Hall. The arts program was open to art work of any form, and there was no prescreening of exhibits prior to Hopper's submission. Therefore, the basic structure of Pasco's arts program suggests an intent to permit unrestricted expression. Second, despite its stated policy of avoiding "controversial art," Pasco never established criteria by which to

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the actual language of Rule *56(c),* which precludes summary judgment where there is a dispute over *"material* fact[s]" (emphasis added). Having created the designated public forum, no trial is needed to determine what might have been when we have before us undisputed facts as to what actually occurred.

Contrary to any suggestion that we are weighing evidence, the *undisputed* evidence is that once Pasco created this forum, the city was inconsistent with respect to pre-screening, even as to *who* would conduct such pre-screening. Such an inconsistent policy is no policy at all for the purposes of forum analysis.

assess whether or not a work would fall within the policy. Instead, application of the policy was left entirely to the discretion of city administrators.

The potential for abuse of such unbounded discretion is heightened by the inherently subjective nature of the standard itself.[11] A ban on "controversial art" may all too easily lend itself to viewpoint discrimination, a practice forbidden even in limited public fora.[12] *See Cohen V. Califfornia*, 403 U.S. 15, 25 (1971) (describing the inability of government

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[11]Pasco's policy against "offensive or politically motivated" art appears at least as subjective as the policies criticized in the cases cited above. *Cf Mergens*, *496* U.S. at 244 (after hours school access barred to "noncurriculum related" student groups); *Putnam*, 221 F.3d at *845* (eligibility for links to the city's website restricted to websites "promot[ingj the city's tourism, industry and economic welfare"); *Cinevision*, 745 F.2d at 573 (ban on "hard rock" concerts); *Gregoire*, 907 F.2d at 1374 (school access limited to civic' or education-related groups).

[12]By definition, that which is "controversial" is "a cause of

officials to make principled distinctions on matters of taste and warning that censorship on this basis offers "a convenient guise for banning the expression of unpopular views"); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55 (1988) (permitting civil liability for "outrageous" social commentary invites viewpoint discrimination); *see also Federal Communications Corp. V. Pacifica Foundation,* 438 U.S. 726, 745-46 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for

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disagreement," or subject to opposing views. Webster's Third New Int'l Dictionary, p.1366. Whether or not a given work causes such disagreement may hinge on the particular viewpoint an art piece is deemed to espouse as much as the manner in which that view is expressed. Widely accepted views will be much less likely to spark controversy than expressions of the opposing (minority) view. Works that represent conventional wisdom may not be perceived as conveying a viewpoint at all. For example, where the "Starving Man" sculpture was criticized as sending a bad message, one suspects a statue of a "well-fed man" would not be.

suppressing it . . . . government must remain neutral in the marketplace of ideas."). Not only was Pasco's policy intrinsically flawed, its enforcement of the policy was, in practice, contingent upon the subjective reaction of viewers of the artwork, as perceived by the city management.[13] Such "censorship by public opinion" only adds to the risk of constitutional impropriety. *Cf. Texas V. Johnson*, 491 U.S. 397, 408-409 (1989) (invalidating ban on flag-burning where offense hinges on audience reaction).

This is not to say that community standards of decency have no place in the regulation of government property; our cases merely insist that

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[13]The city does not appear to have affirmatively solicited any feedback on the art work it displayed prior to Hopper's submission. Therefore, its assessment of viewers' reactions would have been based solely on opinions volunteered, a sample pool likely weighted toward those voicing complaints.

such standards be reduced to objective criteria set out in advance. In the absence of such guideposts, we must scrutinize Pasco's actual practice all the more closely for apparent inconsistency or abuse in enforcing the policy.

A review of the art work displayed during Pasco's short-lived series of exhibits demonstrates that the concerns articulated in the preceding paragraphs are by no means hypothetical. It is undisputed that works involving nudity were displayed in earlier exhibitions without apparent negative comment. Pasco's *post-hoc* distinction between the "abstracted" depictions of nudity in these works and the perceived "sexual" nature of Hopper and Rupp's submissions does not erase the suspicion that a double-standard might have been applied. *Cf Lakewood*, 486 U.S. at 758 (discussing the potential for administrators to concoct *post-hoc* rationalizations for inconsistent treatment in the absence of substantive standards).

Such suspicion is brought into sharp relief by the city's handling of the "Starving Man" sculpture. It is

undisputed that this work actually *did* generate negative feedback and, thus, would appear to fall, at least *prima facie,* within the terms of the prohibition on "controversial" art work.[14] Both the city and dissent cite testimony that the controversy surrounding the "Starving Man" sculpture never rose to the level created by the work of Hopper and Rupp and thus cannot be taken as evidence of any genuine inconsistency in Pasco's enforcement of its policy. Given the posture of summary judgment, we must accept such testimony unchallenged. Even so, Pasco has failed to articulate any basis to validate its asserted distinction in the degree of "controversialness" separating the respective art work other than the entirely subjective and ad hoc

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[14]In addition, the political overtones suggested by the sculpture's title and subject matter provide a second basis for its possible exclusion.

reactions of the limited subset of viewers whose opinions came to the attention of city administrators. To remand for trial of this issue under such a standard would only yield a verdict as arbitrary as the standard itself. Moreover, to sanction the suppression of speech on this basis would be to abdicate meaningful judicial review. *See id.* (without express standards, "the use of shifting or illegitimate criteria are far too easy.").

Having effectively opened its doors to all comers, subject only a standardless standard, Pasco has failed to exercise the clear and consistent control over the exhibits in city hall that our cases require to maintain a limited public forum. Its stated policy is belied by "objective indicia" of a contrary intent. *Paulsen V. County of Nassau,* 925 F.2d *65,* 70 (2d Cir. 1991).[15]

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[15]The dissent's characterization of the Gallery as a "short-lived experiment" understates the significance of the actions taken by Pasco and the Arts Council in arranging the showings. The

Other factors considered by courts in designated public forum analysis also favor the artists here. Unlike cases involving commercial speech, the purpose of the exhibitions here was purely aesthetic and expressive the city hoped to promote and display the work of local artists as a means of beautifying the new city hall. Moreover, the nature of the property is consistent with the expressive activity at issue here. The city created the exhibition program and invited the participation of local artists because it hoped to increase the aesthetic appeal of the new city hall *by adding art.* Although there is some evidence that unrestricted artist expression could be

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agreements with the artists featured extensive documentation, formal written contracts, prior discussion, and arrangement for display space in City Hall. The Gallery ran three separate exhibits. The dissent's efforts to shoehorn these exhibits into an "experimental" status does not counsel for a different First Amendment standard.

deemed inappropriate for certain users of city hall, the dissent concedes that "there is no evidence that the displays, even if controversial, would have directly affected the running of the city government." Nor is this a case involving advertising or commercial speech, where the government is engaged in commerce and where allowing certain expressive activity might harm advertising sales or tarnish business reputation. *See Lehman,* 418 U.S. at 303-04; *Children of the Rosary,* 154 F.3d at 977-78.

For these reasons, with respect to the artists' motion for cross summary judgment, we hold that the city created a public forum, specifically a designated public forum, in the art displays.

3. ***Strict Scrutiny***

Having determined that the city created a designated public forum, we now consider whether the city's reasons for excluding the artists' work can survive strict scrutiny. *See Perry,* 460 U.S. at 45-46 (In a public forum, "the rights of the State to limit expressive activity are sharply circumscribed .... For

the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.") (citation omitted); *DiLoreto,* 196 F.3d at 964-65. The city insists that the works by Hopper and Rupp "were simply the right thing in the wrong place." (quoting Justice Sutherland in *Euclid V. Ambler Realty Co.,* 272 U.S. 365, 388 (1926), for the proposition that "[a] nuisance may be merely the right thing in the wrong place, like a pig in the parlor instead of the barnyard"). What made the City Hall Gallery the wrong place, the city contends, is the presence of employees, children, and citizens seeking to conduct their business with the city and, of course, the city's content-based conclusion that plaintiffs' works were political, sexual, and controversial. The city steadfastly maintains that its exclusion of plaintiffs' works was not "censorship" since Hopper and Rupp "have been free to show their art throughout the City, *other than [at] city hall."* The art, in Pasco's view,

was merely ejected from the parlor, not thrown off the farm. But relegating the art to the barnyard does not pass First Amendment scrutiny.

[8] We do not endorse Pasco's cramped view of what constitutes censorship, and we find none of the city's reasons for excluding the art work compelling. Although children may pass through the hallways of the building, the city concedes that the works are not obscene, and it is beyond peradventure that the works have serious artistic value. And the city offered no evidence to suggest that children would be harmed by, or even saw, the works. The mere fact that the works caused controversy is, of course, patently insufficient to justify their suppression. *See Texas V. Johnson,* 491 U.S. 397, 414 (1989) ("If there is a bedrock principle of the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (citations omitted); *Consolidated Edison Co. V. Public Serv. Comm'n,* 447 U.S. 530, 537-38 (1980); *Cinevision,* 745 F.2d at

571.[16]

[9] Finally, as we said in *Cinevision:*

> Although the City was not required to open the [property] and is not required to leave it open indefinitely, it cannot, absent a compelling government interest, open the forum to some and close it to others solely in order to suppress the content of protected expression. Generally, "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."

745 F.2d at 571 (footnote omitted) (quoting *Police Dept. of Chicago V. Mosley,* 408 U.S. 92, 96 (1972)).

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[16] Given the location and small size of the banned works, we find no merit in the city's theory that children and/or city employees were a captive audience. *See Cohen V. California,* 403 U.S. 15, 21(1971); *cf Lehman,* 418 U.S. 307-08 (Douglas, J., concurring) (distinguishing between expression one can avoid if one so chooses and unavoidable expression).

As in *Cinevision,* Pasco's standard for disapproval of works in the exhibition ("controversialness") fails the narrow tailoring requirement because it "does not adequately limit the discretion of the [city] in approving or disapproving the proposals." *Id.* (citing *Board of Educ., Island Trees Union Free Sch. Dist. No.26 V. Pico,* 457 U.S. 853, 864-65 (1982) (plurality opinion)). Accordingly, we hold that Hopper and Rupp's First Amendment rights were violated by the exclusion of their works from the Pasco City Hall Gallery.[17] The district court erred in denying their cross-motion for partial summary judgment.

This result is, in certain ways, an unfortunate one. We recognize that city administrators set out to display art, not to censor it-although in the end, censorship prevailed. We also acknowledge that they walked a fine line as they tried to please the City

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[17]Under this analysis, we need not reach the question of viewpoint discrimination.

Council, city workers, the local arts community, and the public at large, all of whom likely had different views as to what constituted art "appropriate" for City Hall. But while Pasco may have blundered into the controversy that ended its arts program, it could have avoided this problem by establishing and enforcing a clearly articulated policy that would pass First Amendment muster. Contrary to the dissent's assertion that our decision here "will discourage cities from experimenting with public art displays," our analysis in no way precludes such city programs administered in a consistent and clearly articulated manner. But the fact that the city was well intentioned and acted in good faith does not excuse its violation of the artists' First Amendment rights.

B. Municipal Liability

[10] Our analysis does not end with the conclusion that there was a First Amendment violation. The city can only be held liable if the acts in question were undertaken pursuant to official policy or custom. *See Monell V. Dep 't of Social Services,* 436 U.S. *658,*

690-91(1978). The city has maintained that there are genuine issues as to whether Crutchfield was a final policymaker within the meaning of *Monell.* The district court discussed the issue briefly, but decided not to reach the merits because it perceived no underlying First Amendment violation. We, too, decline to reach this issue given the outstanding factual dispute about Crutchfield' s role.

[11] In *Monell,* the Supreme Court held that 42 U.S.C. § 1983 applies to municipalities and other local government units, *see* 436 U.S. at 690, but noted that a municipality may *not* be held liable on a respondeat superior theory for the unconstitutional acts of its employees. Rather, municipal liability springs from an impermissible policy or practice:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly

> said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694; *see also Gillette V. Delmore,* 979 F.2d 1342, 1346 (9th Cir. 1992) (the *Monell* Court "made clear that the municipality itself must cause the constitutional deprivation and that a city may not be held vicariously liable for the unconstitutional acts of its employees under the theory of respondeat superior") (citing *Monell* and *City of Canton V. Harris,* 489 U.S. 378, 385 (1989)). The requirement that action be taken pursuant to an official policy or custom arises from the Court's recognition that "Congress did not intend municipalities to be held liable unless action pursuant to official policy of some nature caused a constitutional tort." *Monell,* 436 U.S. at 691; *see also City of SL Louis V. Praprotnik,* 485 U.S. 112, 122 (1988) ("vicarious liability would be incompatible with the causation requirement set out on the face of

§ 1983").[18] As we have noted, there are three ways to meet *Monell's* policy or custom requirement:

> First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal government policy or a "longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity." *Jett V. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (internal quotation omitted).... Second, the plaintiff may establish that the individual who committed the constitutional tort was an

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[18] This is not to say that municipal liability is precluded where the case involves a single decision by a policymaker an action taken only once as opposed to a repeated course of conduct. As the Supreme Court held in *Pembaur V. City of Cincinatti,* 475 U.S. 469, 481 (1986), an individual decision by a city's "authorized decisionmaker.... surely represents an act of official government policy."

> official with "final policy-making authority" and that the challenged action itself thus constituted an act of official government policy. *See Pembaur,* 475 U.S. at 480-81; McKinley V. *City of Eloy,* 705 F.2d 1110, 1116 (9th Cir.1983).... Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it. *See Praprotnik,* 485 U.S. at 127; *Hammond V. County of Madera,* 859 F.2d 797, 801-02 (9th Cir. 1988).

Gillette, 979 F.2d at 1346-47.

[12] Here, because the art program was not the product of any formal policy or longstanding practice, Hopper and Rupp must either show that the city manager was a final policy-maker with respect to

the arts program or that the city council ratified his decision to exclude the works. Because there are material facts in dispute as to this issue, we remand to the district court for resolution of *Monell* liability.

IV. CONCLUSION

We REVERSE the grant of summary judgment to Pasco, REVERSE the district court's denial of Hopper and Rupp's cross-motion for partial summary judgment on the question whether Pasco violated their First Amendment rights, and REMAND for adjudication of the municipal liability issue. The district court is further directed to resume jurisdiction over the breach of contract claim against the Arts Council.

REVERSED AND REMANDED.

GOULD, Circuit Judge, concurring in part and dissenting in part:

This case presents the question whether the City of Pasco, Washington ("Pasco") violated the First

Amendment when it invited local artists to display their work in its new city hall and then refused to permit certain pieces of art to be placed or remain on display after the art provoked controversy. I concur in the reversal of the award of summary judgment to Pasco, but dissent from the award of partial summary judgment to the artists based on the majority's conclusion that Pasco created a designated public forum. I respectfully dissent because factual issues of Pasco' s intent remain, United States Supreme Court precedent dictates a different rule regarding the creation of a designated public forum in light of the summary judgment standard, and the Ninth Circuit should wait for development of a full factual record before creating a new rule. I also dissent because the majority's ruling is unfair to and unworkable for cities within the Ninth Circuit and likely will discourage cities from experimenting with public art displays, which ultimately will be more harmful for artists than permitting Pasco to have its day in court.

I

In 1994, Pasco remodeled a former school building and converted it into a new city hall. In an effort to decorate the bare walls of the new space, Gary Crutchfield, the City Manager, and his administrative assistant, Kurt Luhrs, decided to institute an experimental program whereby local artists would be invited to display their work in the newly remodeled building. Because Crutchfield did not want city employees to devote time and energy administering this program, Luhrs sought assistance from the Arts Council of Mid-Columbia Region ("the Arts Council"), a private entity that promoted the arts. Luhrs' primary contact at the Arts Council was its director, Barbara Gurth. Luhrs and Gurth agreed that the Arts Council would locate the art and administer the program in exchange for a $500 quarterly fee.

During initial discussions, Luhrs made clear to Gurth that Pasco was concerned about generating controversy: He instructed her that, in selecting art for the program, work of a "questionable nature"

should not be displayed. In a letter to Gurth, he described Pasco's concerns about this experimental program:

> During our conversation I got the impression that your board felt that our approach may not be a commitment to the long term management of such a project. This is far from the case. Both Gary and I feel that this approach will ensure support when I bring this item to council in a public meeting. Personally, my greatest fear is bringing such a program to council and having various citizens with a conservative "bent" raise issues that have caused trouble for the National Endowment of the Arts, i.e. offensive or politically motivated art. Through our discussions, I feel assured that the Arts Council will not use the City Hall Gallery as a venue for controversy. Nevertheless, without a demonstration, I feel that the unfounded fears of a few citizens would ruin this great opportunity

for introducing the arts to our citizens.

Consistent with Pasco's concerns and shortly after announcing the project, Gurth sent a letter to artists who had expressed interest in the project and warned of the need to avoid controversial subject matter:

> Subject matter: Wide open, but with the restraints that would be expected with a public arts project paid ~~for with~~ public money. To offer a quote from a city official's letter regarding this project ". . . my greatest fear is . . . having various citizens . . . raise issues that have caused trouble for the National Endowment for the Arts, i.e., offensive or politically motivated art. Through our discussions, I feel assured that the Arts Council will not use the City Hall Gallery as a venue for controversy."
>
> Indeed, the Arts Council will not. I have worked for five years to bring the cities on board for the arts, and I will not jeopardize

> our progress. Additionally, I do not think that regional art in this area presents a problem in this regard, *but* the Council will reserve the right to reject subject matter that the committee feels may present a problem for a conservative public sector. As an art historian whose major is in post-WW II American Art, this is an enormous compromise for me, but as an arts administrator motivated by the belief that the arts are necessary to the construction of a well balanced society, I realize compromise is necessary. Rejection of a particular piece should not, therefore, be construed by an exhibiting artist as censorship, but as a means of compromise to encourage public partnerships for arts action.

Thus, in announcing the program to the arts community, Gurth suggested that controversy would destroy the project and that artists submitting work

could expect to be censored if their work was controversial.

There is, however, ambiguous and contradictory evidence about who would take responsibility for screening submitted artwork. Gurth's announcement letter suggested Arts Council responsibility ("the Council will reserve the right to reject subject matter that the committee feels may present a problem for a conservative public sector"). City Manager Crutchfield also understood that the Arts Council would screen works for suitability, testifying that the "Arts Council would do everything." Similarly, Crutchfield's assistant Luhrs testified that Pasco had no expertise in art and that the Arts Council should ensure that artists presenting political or offensive art would not be invited to participate. On the other hand, after the onset of this litigation, Gurth testified that she believed Pasco not the Arts Council would be responsible for screening. She said that the Arts Council viewed itself as a "middleman" and although it planned to convene a screening committee if the

program became permanent, it did not intend to do so, and did not do so, in the initial stage. More specifically, she testified:

> Mr. Luhrs did express a concern on the telephone that work of a questionable nature not be submitted and I assured him that I didn't think that was a problem. This was not a progressive area, where the visual arts are concerned, and it's made up mainly of landscape and flower painters, and there had never been a question about work being questionable in its content. So I assured him I didn't think it would be a problem, but that they [Pasco] would have to make that judgment.

On cross-examination, however, Gurth conceded that she may have agreed with Luhrs that "[w]e would both probably have a hand" in content control.

The course of events of the short-lived experiment is not entirely clear. The exhibits were scheduled to

run three months at a time. The first exhibit ran from August through October 1995 and the second ran from November 1995 through January 1996. There is no evidence that either Pasco or the Arts Council screened the artwork before its display in these two exhibits. Although some individuals criticized a few pieces, there is no evidence that Pasco or the Arts Council prevented the display of any work or that they removed any work from display in response to public complaints.

The art displayed during these two exhibits generated very little controversy. Some works depicted nudity, but Gurth testified these were "abstracted" and nothing in the record indicates that they caused a genuine controversy. The record indicates, however, some controversy surrounding a sculpture known as "The Starving Man." Gurth testified, "from the very first exhibit, some people wanted one of the works removed. It was a clothed figure . . . . The figure was [a] life-size ceramic figure, and he called it 'The Starving Man.' " When

asked about this criticism, Gurth testified: "It didn't send a good message, a starving man." But she also testified that there was never any serious discussion about removing it. Apart from "The Starving Man," the first two exhibits were uneventful.

Appellants Hopper and Rupp were invited to participate in the third exhibit, scheduled to run from February through April 1996. Luhrs testified that before the third exhibit, Gurth called to tell him she had not reviewed Hopper's work because she was out of town and that Luhrs might want to "check it out." This call prompted Luhrs to review Hopper's pieces when they arrived, although he had not reviewed any previous submissions. Gurth denied this telephone conversation took place. In any event, when Hopper submitted prints showing a naked couple in varied scenes, Crutchfield and Luhrs refused to hang the prints.

Rupp submitted a sculpture titled "To the Democrats, Republicans, and Bipartisans," which depicted a woman's bare buttocks "mooning" the

viewer. Although Crutchfield and Luhrs initially permitted Rupp's piece to be displayed, complaints ultimately prompted Crutchfield to direct its removal. Hopper and Rupp sued both Pasco and the Arts Council asserting, *inter alia,* a cause of action against Pasco under 42 U.S.C. § 1983 for the alleged violation of the First Amendment. Hopper and Rupp sought declaratory and injunctive relief, damages, and attorney's fees. On cross-motions for summary judgment, the district court ruled for Pasco and against Hopper and Rupp. This appeal followed.

II

In *Perry Education Assn. V. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), the Supreme Court adopted a "forum analysis" framework for determining when restrictions of speech on government property are permissible. Within this framework, the Court recognized three types of forums: traditional, designated, and non-public. *Id.* at 45-46.

There is no question that Pasco' s city hall is not a traditional public forum. Instead, as the majority correctly recognizes, resolution of the dispute in this case turns largely on whether Pasco converted its city hall from a non-public forum, where it would have relatively broad power to regulate expression, into a designated public forum, where its constitutional ability to regulate speech would be strictly limited. More specifically, we are not dealing here with an attempt by Pasco to censor or preclude the showing of artwork by Hopper, Rupp, or any other artist in traditional public forums. Nor are we concerned with an attempt generally to preclude the showing of "controversial" artwork at all or selected locations within Pasco city limits. Instead, this case is about Pasco's right to regulate expression in a space that normally is not a public forum and that can become a public forum *only* through Pasco's intentional action creating one. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United*

States Postal Service V. Greenburgh Civic Ass'ns., **453 U.S.** 114, 129 (1981).

The key to whether the government has created a designated public forum is governmental intent. *Cornelius V. NAACP Legal Defense and Educational Fund, Inc.*, **473 U.S.** 788, 802 *(1985)*. The Supreme Court has identified three primary factors to consider in determining whether the government intended to create a designated public forum: (1) what the government said; (2) what the government did; and (3) the compatibility of the space with the expression.

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the

> nature of the property and its compatibility with expressive activity to discern the government's intent.

Id. at 802 (citing *Perry*, 460 U.S. at 47) (internal citations omitted). We must consider these factors to determine whether they "indicate an intent to designate a public forum dedicated to expressive activities." *Diloreto V. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999). This is precisely where, in my view, the majority goes astray as it does not consider each of the *Cornelius* factors in light of the correct summary judgment standard.

In ruling on a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his [or her] favor." *Anderson V. Liberty Lobby, Inc.*, 477 U.S. 242, *255* (1986). Summary judgment is

proper only if there is "no genuine issue as to any material fact." *Id.* at 258. A "genuine issue exists, precluding summary judgment, as long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "[A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 249 (quoting *First Nat'l Bank of Arizona V. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)).

In light of these cautionary and salutary principles, summary judgment for *either* party is inappropriate because the three *Cornelius* factors support reasonable inferences in favor of either party on the issue of Pasco' s intent to create a designated public forum.

III

If the evidence is viewed in the light most favorable to Hopper and Rupp, the non-moving parties with respect to Pasco's motion for summary judgment, and

if all permissible inferences are drawn in their favor, there is no question the district court erred in granting Pasco summary judgment based on the finding that the city hall was a non-public forum. To this extent, I agree with the majority's analysis.

Pasco's initial communications with the Arts Council indicated a concern to avoid controversial subject matter. Viewing the evidence in the light most favorable to Hopper and Rupp, however, Pasco's conduct does not reflect its expressed intent. Before the incidents with Hopper and Rupp, neither Pasco nor the Art's Council pre-screened the artwork. Evidently all submitted art was displayed. Although some art generated a small degree of controversy and was arguably political (e.g., the "Starving Man"), Pasco made no effort to remove any art. The "City Hall Art Gallery" was located in the lobby of city hall, which a reasonable juror might perceive to be a natural place for the display of all types of art if all inferences are given the artists. Moreover, there is no evidence that the displays, even if controversial,

would have directly affected the running of the city government. *Cf. Cornelius, 473* U.S. at 792 (before regulations "the increasing number of entities seeking access to federal buildings and the multiplicity of appeals disrupted the work environment and confused employees who were unfamiliar with the groups seeking contributions").

Viewing this evidence in the light most favorable to Hopper and Rupp, a reasonable juror could conclude that even if Pasco initially intended to permit display only of selected, non-controversial art, it abandoned that intent. Similarly, in this light, the nature of the space and Pasco's conduct could support the conclusion that Pasco intended to open its city hall to the unrestricted display of art.

The district court assumed the role of trier of fact when it concluded that Pasco' s stated policy trumped *any* reasonable inferences that might be drawn from Pasco's actual practice or from the nature of the space. This was error and, as the majority correctly determines, summary judgment for Pasco must be

reversed. *See Liberty Lobby,* 477 U.S. at *250-51.*

IV

I respectfully disagree, however, with the majority's further holding that Hopper and Rupp are entitled to partial summary judgment. We must view the evidence in the light most favorable to *Pasco* when considering Hopper and Rupp's cross-motion for summary judgment. Viewing the evidence in this light, a reasonable juror could find that Pasco did not intend to open its city hall as a public forum.

It is undisputed that Pasco's stated intent at the outset of the experimental project was *not* to open its city hall to unrestricted or indiscriminate artistic activity. Viewed in the light most favorable to Pasco, this undisputed evidence and reasonable inferences therefrom alone are sufficient to preclude a partial summary judgment for Hopper and Rupp on the public forum and free speech issues. To grant summary judgment to Hopper and Rupp in light of this evidence of Pasco's intent, we must either: (1) weigh this important evidence and determine it counts

for nothing; (2) conclude that Pasco did not mean what it said; or (3) conclude that Pasco meant what it said but later changed its mind. However, we may not weigh and interpret evidence because this is a function solely reserved for the trier of fact.

Reasonable inferences that a trier of fact may draw from the nature of the space also preclude granting partial summary judgment to Hopper and Rupp. Both Pasco and the Arts Council expressed concern that continued funding might be jeopardized by a display of art that generated controversy. Luhrs' letter to the Arts Council stated: "my greatest fear is bringing such a program to council and having various citizens with a conservative 'bent' raise issues that have caused trouble for the National Endowment of the Arts, i.e. offensive or politically motivated art." In response, Gurth's announcement letter noted: "I have worked for five years to bring the cities on board for the arts, and I will not jeopardize our progress." Viewing these statements in the light most favorable to Pasco, a trier of fact could reasonably conclude that the space was

not, in fact, compatible with an open public forum.

Similarly, Pasco's conduct was not unambiguous and does not necessarily support the inference that Pasco intended to create a designated public forum. Even assuming that Pasco did not perform any screening until it encountered Hopper's and Rupp' s pieces, this does not compel the conclusion that Pasco intended to create a designated public forum. A reasonable juror, viewing the evidence in the light most favorable to Pasco, could conclude that any lack of screening was the result not of a conscious plan, but of inaction caused by inadvertence or a breakdown in communications. While Pasco thought the Arts Council was screening the artwork to avoid controversial material, the Arts Council believed it was a middleman subject to Pasco's final determination to exclude objectionable work. As *Cornelius* makes clear, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." 473 U.S.

at 802.

Similarly, a reasonable juror could conclude that the brief experimental period before Pasco excluded Hopper's and Rupp's works is too short, and the record too sparse, to show any unambiguous intent to open the forum. Viewing the evidence in the light most favorable to Pasco, there was no substantial controversy before the controversy regarding Hopper's and Rupp's pieces. As noted above, the earlier abstracted nudes generated virtually no comment. And although the "Starving Man" piece generated some dispute, Gurth testified:

> Question: Did you have a discussion about removing it, a serious discussion?
>
> Answer: No, it didn't escalate to that point. I simply alerted the artist that it may happen, and we were prepared to take it out if Pasco insisted. And so the artist said that was fine by him. He had no qualms with it, it would only enhance his reputation.

Viewing this evidence in the light most favorable to Pasco, a reasonable juror could infer *not* that Pasco failed consistently to enforce a policy of excluding controversial art, but that before encountering Hopper's and Rupp's pieces, Pasco never faced occasion or need to enforce the policy. The majority's conclusion that Hopper and Rupp are entitled to summary judgment depends on its weighing of these conflicting inferences a function properly reserved for the trier of fact.

V

I respectfully do not agree with the majority's reliance on *Christ's Bride, Planned Parenthood, Grace Bible,* and *United Food* to grant summary judgment to Hopper and Rupp. When fully examined, these cases highlight the ambiguity of the evidence in this case as well as the need for a full trial to develop an adequate record.

In *Christ's Bride Ministries, Inc. V. SEPTA,* 148 F.3d 242, 244 (3rd Cir. 1998), *cert. denied, 525* U.S. 1068 (1999), the Third Circuit reviewed the

decision of the Regional Transit Authority ("RTA") to remove a poster from a bus submitted by an anti-abortion group, which stated "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer." There, *following a bench trial* the district court found that the Transit Authority had not created a public forum and accordingly could permissibly remove the poster. *Id.* The Third Circuit, having the benefit of a full record before it, reversed. The court noted that the RTA had a long practice of accepting numerous ads on a wide range of topics, including religious and political messages, explicit ads regarding safe sex, abstinence and AIDS, and ads in favor of abortion rights. Of the many such controversial advertisements submitted, the RTA rejected or requested modification of only three - none of which related to abortion. *Id.* at 251-52. The Third Circuit thus concluded that the RTA's practice of permitting numerous controversial advertisements and several abortion-related advertisements indicated an intent to create a public forum for the display of material

relating to abortion. *Id.* at 252. Moreover, the court found that the RTA's stated policy also supported the inference that it intended to create a public forum because the policy did not provide for the type of limitations on speech reflected by the removal of the anti-abortion poster. *Id.*

Here, in stark contrast, there is no record of a long practice allowing controversial artwork. During the experimental period, there was only a scintilla of evidence suggesting some inchoate controversy surrounding one piece[1] and no evidence of any serious controversy. We cannot correctly conclude as a matter of law that Pasco had a consistent practice of permitting controversial artwork. In the short time the project proceeded, Pasco was faced with few

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[1]The sparse record does not contain any photograph, drawing or replica of this piece. The fact that the record is not sufficiently developed to determine the nature of any prior "controversy" further supports a remand for a trial on the merits.

instances of even arguably controversial art. And unlike *Christ's Bride,* Pasco's stated policy is not consistent with an intent to create a designated public forum. *Christ's Bride* does not support the majority's conclusion that Hopper and Rupp are entitled to partial summary judgment rather than a trial.

Similarly, neither *Planned Parenthood Ass 'n V. Chicago Transit Auth.,* 767 F.2d 1225 (7th Cir. 1985), nor *Grace Bible Fellowship, Inc. V. Maine Sch. Admin. Dist. #5,* 941 F.2d 45 (1st Cir. 1991), supports the proposition that summary judgment is appropriate where intent to create a designated public forum is ambiguous, as it is here. In *Planned Parenthood, following a bench trial* the district court found that the Chicago Transit Authority ("CTA") created a limited public forum on its buses and thus improperly excluded the plaintiff's abortion-related advertising. 767 F.2d at 1228. The district court found that the CTA' s alleged policy of excluding certain material (such as the advertisement at issue) was contrived for the lawsuit and that over a ten-year

period the CTA permitted a wide range of controversial advertising, including advertisements relating to abortion. *Id.* The only issue on appeal was whether these factual findings were clearly erroneous. *Id.* At 1228-29. Similarly, in *Grace Bible, following a bench trial* the district court found that the defendant school district created a designated public forum. 941 F.2d at 46-47. The First Circuit affirmed on the ground that the school district's written policies indicated an intent to open its facilities indiscriminately to the community, rather than to restrict access to school-related uses. *Id.* at 47-48. Further, the district's practice of allowing many organizations to use its facilities reflected this intent. *Id.*

Both *Planned Parenthood* and *Grace Bible* involved an extensive record of a past practice permitting the type of speech the government later sought to ban, which contradicted the government's claim that it limited access to its property. Both involved either an express policy demonstrating an

intent to open the space or a post hoc policy contrived to conceal censorship. And in both cases a trial was conducted, the record fully developed, and factual determinations made at trial were controlling. Here, in contrast, the record of Pasco' s past practice is barely existent and Pasco' s express policy genuinely does not show an intent to create a designated public forum. And perhaps most importantly, neither party has had the opportunity to develop a full record at trial and key facts cannot properly be determined on this appeal.

United Food & Commercial Workers Union, Local J099 V. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341(6th Cir. 1998), similarly does not support granting summary judgment for Hopper and Rupp. There, the Sixth Circuit relied on *Cornelius* and reasoned that "[w]e . . . must closely examine whether in practice [the transit authority) has consistently enforced its written policy in order to satisfy ourselves that [its) stated policy represents its actual policy." *Id.* at 353. Because the union did not

identify any advertisements accepted by the transit authority that violated the written policy, the court noted "we have no reason based on the record at this time to believe [the transit authority) applies its written policy on an *ad hoc* basis." *Id.* However, the court observed "[s]hould [the union] introduce evidence at trial demonstrating that [the transit authority) has not consistently followed its written policy, but instead has maintained an *ad hoc* policy where the acceptability of an advertisement depends on the whim of the decision-maker, this would strongly suggest that [the transit authority) has created a public forum." *Id.* at n.6. As previously discussed, here there is no evidence demonstrating Pasco's inconsistent enforcement of its written policy because the experimental exhibitions generated little to no controversy with which to test its stated policy. *United Food* does not support the majority's use of a scant record to grant partial summary judgment to Hopper and Rupp on the public forum issue; instead, *United Food* supports remanding this issue for trial.

Certainly inconsistent enforcement of a policy may be evidence of governmental intent to create a designated public forum. And a jury instruction on the standards for determining intent might properly encourage consideration of this factor. If enforcement history is considered at a trial, and a trier of fact finds the history supports a determination of intent to create a designated public forum, this evidence may be properly credited by an appellate court. Notwithstanding, these principles do not justify the majority's approach of making an ambiguous enforcement practice----- not considered by a trier of fact-----the sole determining factor.

VI

The Supreme Court instructs that governmental intent is the key to forum analysis because the government does not convert its property into a public forum absent an intent to do so. *Cornelius*, 473 U.S. at 802; *see also General Media Communications, Inc. V. Cohen*, 131 F.3d 273, 279 (2d Cir. 1997) (intent is "touchstone" of forum

analysis); *Sentinal Communications Co. V. Watts,* 936 F.2d 1189, 1202 (11th Cir. 1991) (same); *Gregoire V. Centennial Sch. Dist.,* 907 F.2d 1366, 1386 (3d Cir. 1990) (same); *Stewart V. District of Columbia Armory Bd.,* 863 F.2d 1013, 1016 (D.C. Cir. 1988) (same). It necessarily follows that whether a government entity intended to open a forum is an "inherently factual inquiry that should not be resolved without due attention to an underlying record." *Air Line Pilots Ass 'n, Int'l V. Dept. of Aviation of the City of Chicago, 45* F.3d 1144, 1152 (7th Cir. 1995); *Stewart,* 863 F.2d at 1018. Where important constitutional issues turn on the outcome of the intent inquiry, summary judgment is likely to be inappropriate. *Searcey V. Crim,* 815 F.2d 1389, 1392-93 (11th Cir. 1987) (summary judgment on issue of government intent to create limited public forum inappropriate); *May V. Evansville-Vanderburgh Sch. Corp.,* 787 F.2d 1105, 1115 (7th Cir. 1986) (same); *see also, e.g., Perry V. Sinderman,* 408 U.S. 593, 598 (1972) (where

government's motive was element of § 1983 claim, summary judgment was improper).

Summary judgment almost certainly is inappropriate in a case such as this where intent is at issue. "In many constitutional and civil rights cases, a necessary element of the claim for relief presents an inquiry into the state of mind of one or more of the parties . . . . [C]laims requiring a determination regarding intentions or motives are particularly unsuitable for summary adjudication." Wright, Miller & Kane, *Federal Practice and Procedure, Civil* 2d § 2732.2 (1998). In fact, in a related context involving a plaintiff's claim that he had been fired for exercising his First Amendment rights, this court noted that "a fair resolution" of the issues of the employer's motive and intent - essential elements of the claim "requires a full trial on the merits," and that those questions are "plainly . . . reserved to the trier of fact." *Peacock V. Duval,* 694 F.2d 644, 646 (9th Cir. 1982) (internal citations and quotations omitted).

Such is the case here. At best the record is incomplete and supports contrary inferences regarding Pasco's intent, thus precluding summary judgment for either party. A grant of partial summary judgment to Hopper and Rupp is inconsistent with the Supreme Court's teaching in *Liberty Lobby,* which bars a court from making factual determinations when the record supports conflicting inferences. "[At] the summary judgment stage the judge's function is not himself [or herself) to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby,* 477 U.S. at 429.

A failure correctly to apply the *Cornelius* factors and the proper summary judgment standard to the key question of Pasco's intent is error.[2] The majority

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[2]The majority incorrectly assumes that a forum was created, and then argues that there is no genuine issue of material fact concerning Pasco's allegedly inconsistent screening policy. Majority Opinion at 2132 n. 10. With respect, the majority misses

in effect creates a new per se rule that the government's failure systematically to enforce an exclusionary policy without regard to whether there was even an appropriate occasion to enforce such policy conclusively establishes that it has created a

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the point. There is a genuine issue of material fact on Pasco's intent. This requires trial to determine if a limited public forum was ever created. As United States Supreme Court and other authority make clear, intent, and not enforcement policy, is the touchstone of forum analysis. The majority's analysis infers that the "structure of Pasco's arts program suggests an intent to permit unrestricted expression." Majority Opinion at 2132. It is a stretch for the majority to conclude that the structure of the program proves that Pasco's intent is unmistakably different from what Pasco stated in its letters. This requires the majority to draw several inferences adverse to Pasco. Perhaps this can be argued, but when all inferences properly are given Pasco on summary judgment, there can be no doubt that Pasco's letters and statements show that there is a genuine issue of material fact regarding its intent. It is puzzling that the majority mistakenly assumes the role of fact finder on the

designated public forum. This new rule conflicts with the Supreme Court's admonishment in *Perry* and *Cornelius* that intent is the key to the public forum inquiry. It also contradicts the Supreme Court's instruction that a court must look to three factors to determine intent: the government's policy, the government's conduct, and the nature of the space. If reasonable inferences from these three factors support a jury finding that the government did not intend to open up a space for unrestricted expression, partial summary judgment for Hopper and Rupp is inappropriate. *See Liberty Lobby,* 477 U.S. at 428. As demonstrated above, each of these factors support

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issue of intent, which courts almost universally view as a factual issue. The majority's reliance on snatches of language from cases that went to trial hardly answers this objection. And under the Supreme Court's controlling precedents, a lack of consistent enforcement policy, properly viewed, is only one factor that the trier of fact may consider in assessing intent.

such a finding here. Pasco' s intent is an open question and the issue should be submitted to a jury after a trial that fully develops the facts.

Moreover, the majority's new rule undermines important First Amendment interests. As the Supreme Court recently explained:

> The *Cornelius* distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Arkansas Educ. Television Comm'n V. Forbes, 523 U.S. 666, 680 (1998). Faced with a rule that a government's ambiguous conduct alone can support a § 1983 action for damages for First Amendment violations, governments may see their choice as being the "all-or-nothing" choice described in *Forbes* and likely will then refuse to open the property at all. This result harms artists, governments, and the public alike.

It is not necessary to create a new rule that conflicts with Supreme Court precedent when we can instead remand for a trial and abide that precedent. For the foregoing reasons, I respectfully dissent.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 98-35795

D.C. No. CS-97-137-FVS

JANETTE HOPPER, and SHARON RUPP,

Plaintiffs-Appellants,

v.

CITY OF PASCO, and ARTS COUNCIL OF THE MID-COLUMBIA REGION,

Defendants-Appellees.

ORDER

Before: BROWNING, McKEOWN, and GOULD, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing en banc. Judge McKeown has voted to deny the petition for rehearing en banc, and

Judge Browning so recommends. Judge Gould votes to grant the petition for rehearing en banc.

The full court has been advised of the petition, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P.35.

The petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-97-137-FVS

ORDER

JANETTE HOPPER; et al,

Plaintiffs,

vs.

CITY OF PASCO; et al.,

Defendants.

BEFORE THE COURT are defendant's motion for summary judgment, motion to allow disclosure of an expert witness, motion to strike deposition testimony and motion to file an overlength brief, and plaintiffs' cross-motion for partial summary judgment, motion to strike, motion to file an overlength brief and motion to shorten time. These matters were argued on March 27, 1998. Plaintiffs were represented by Paul J. Lawrence and Daniel C.

Poliak; defendant by George Fearing. This Order will memorialize the Court's oral rulings.

Background

This action was brought by artists Janette Hopper and Sharon Rupp against the City of Pasco [City] and The Arts Council of Mid-Columbia Region [Arts Council], a private entity promoting the arts. The gist of the case is that plaintiffs were invited to display their work at city hall, and then summarily disinvited when their submissions provoked controversy. Plaintiffs allege they were censored in violation of the First and Fourteenth Amendments.

In 1994, the City remodeled a former school building and converted it into a new city hall. **Luhrs dep. 10.** The expansive bare walls in this cavernous structure were unattractive. **Crutchfield dep. 26.** Administrative Assistant Kurt Luhrs considered inviting local artists to dress the halls up with exhibitions of their work. **Luhrs dep. 16;**

Crutchfield dep. 26. He cleared the plan with City Manager Gary Crutchfield. **Luhrs dep. 18, 34.** Crutchfield agreed this could be an interesting way to improve the decor of the building. **Crutchfield dep. 31.** He did not think it necessary to approach the city council at that juncture. **Crutchfield dep. at 26; Luhrs dep. 31-32.** He intended to embark on an experimental basis, and if the undertaking proved worthy, he would then ask the city council to permanently fund the impromptu gallery.[1] **Luhrs dep. 32.**

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[1]Crutchfield considered the undertaking an administrative function, not a legislative one. **Crutchfield dep. 26-27, 98.** He thought the trial program to be in the nature of a maintenance issue, such as renting decorative plants or contracting for cleaning services. **Crutchfield dep. 31-32.** Promoting the arts is not so dangerous as establishing a religion or espousing a partisan viewpoint, but it is not far behind. The decision to open a gallery was one to be made by the policy-making body after consultation with its legal advisor, not the policy implementers.

Although supporting the program, Crutchfield was not willing to commit the time and energy of his employees in administering it. **Crutchfield dep. 30; Luhrs dep. 18, 33.** Luhrs sought outside assistance. He approached Barbara Gurth, the director of the Arts Council. Gurth was delighted with the idea and agreed to locate area artists interested in showing their works. **Luhrs dep. 21; Gurth dep. 23, 35-36.** The Arts Council would also administer the program. **Gurth dep. 57.** The City would pay the Arts Council a $500 per quarter fee. **Gurth dep. 36; Luhrs dep. 41-42.** Luhrs cautioned Gurth that content-based restraint would be required, at least initially, and work of a "questionable nature" should not be displayed. **Gurth dep. 40.** The precise nature of such restraint was not discussed (**Gurth dep. 42**), but Luhrs believed it imperative that controversy be avoided. **Ex. 12; Gurth dep. 24-26, 118.**

As an artist and art historian, Gurth chafed at the prospect of censorship, but as an administrator anxious to promote the arts, she understood that compromise was a political necessity and that offending the public would be counterproductive. **Ex. 24.** The Arts Council agreed on the importance of avoiding controversy. **Gurth dep. 118.**

In announcing the program to the art community, Gurth sent out a notice to prospective participants advising that "all works will be screened for content and professional presentation" and that subject matter was "Wide-open, but with the restraints that would be expected with a public arts project paid for with public money." **Ex. 24.** The notice made it clear that controversy would certainly doom the project and that artists could expect to be censored. Id. Neither Hopper nor Rupp were on the roster of artists expressing an interest in participating. Rather, they were solicited by Arts Council staffer Valerie

Edmonds and thus did not receive the notice. **Edmonds dep. 37-38, 42; Rupp dep. 42; Gurth dep. 120-21.** According to Rupp, she was advised by Edmonds that controversial work would not be a problem. **Rupp dep. 47-48.** According to Hopper, she was never told that her work would be screened or that she should avoid controversy or that there were any content restraints. **Hopper dep. 82-83.**

The notice referred to above leaves the impression that the Arts Council would screen works for suitability. **Ex.** 4. Crutchfield was laboring under this impression. **Crutchfield dep. 38-39.** Luhrs felt the City should not be judging content because no one at city hall had any expertise in art. Luhrs dep. 59. He trusted the Arts Council to ensure that artists engaging in political or offensive art would not be invited to participate. Luhrs dep. 54-55, **58.** He had the expectation that the Arts Council would select good quality art. Luhrs dep. 21. However, he did not

tell Gurth of this expectation other than what he stated in a letter to her dated June 20, 1995. Luhrs dep. 58. That letter is vacuous, but does suggest by fair implication that responsibility for content control lay with the Arts Council. **Ex. 12.**

Gurth testified this was not her understanding. Perhaps some time in the future when the program was permanent the Arts Council would convene a screening committee, but not now. **Gurth dep. 63-64.** At the inception stage, the Arts Council would screen only for professional presentation; i.e., appropriate framing, and had no concern with content. **Gurth dep. 57-58.** According to Gurth, the Arts Council's function was to administer rather than to screen for suitability. **Gurth dep. 37.** The Arts Council was "kind of like the middleman. We're the grocery store that distributes peas and carrots." **Gurth dep. 41.** The authority to accept or reject works was the City's. **Gurth dep. 41, 118.**

According to Gurth, it was "always understood" that content control lay with the City. Id. When artists contacted the Arts Council with inquiries about content, they would be told "it was in the hands of City Hall."[2] **Gurth dep. 62.**

The result of this breakdown in communication was that although art was to be content-regulated, no one was screening for content. **Edmonds dep. 26-27.** In the end, the Arts Council was merely a facilitator. The participating artists selected themselves and the content of their work. **Gurth dep. 37; Edmonds dep. 26.** According to Gurth, "We didn't select the artists. We did not pass any qualitative judgment on anybody, or the work, either. We just simply said: These are the people who have agreed to hang this month and we can take this many." **Gurth dep. 37.**

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[2] On cross-examination, Gurth conceded that in her phone conversations with Luhrs, they may have agreed that "we would both probably have a hand" in content control. Gurth dep. 123.

The shows were scheduled to run three months at a time. The first ran from August through October 1995 and the second from November 1995 through January 1996. These shows were for the most part well received and all involved were pleased with the fruit of their efforts. **Gurth dep. 67-60; Crutchfield dep. 40, 42.** Several pieces came under criticism from city employees and members of the public and removal of one was threatened. **Gurth dep. 45-46.** The artist whose work drew fire did not take offense. **Gurth dep. 47.** The piece remained on display despite the criticism. **Gurth dep. 49.** This was Crutchfield's decision. **Luhrs dep. 107.**

For the third show, scheduled to run from February through April 1 1996, the Arts Council invited Hopper and Rupp to join the other participating artists. Both entered into a written contract with the 3 Arts Council promising to display their work throughout the quarterly period and to pay a 20% commission to the Arts Council should their work be

sold while on display. Edmonds dep. **39-40; Hopper dep. 11-12; Exs. 64 & 66.**

Hopper worked with linoleum relief prints. When she submitted her prints, Crutchfield and Luhrs refused to hang them, citing sexual content. **Crutchfield dep. 45-47.** The prints consisted of a series of ten depictions of a naked couple engaged in various activities. **Ex. 2.** None portrayed explicit sexual conduct, but several were suggestive and one contained full frontal male nudity. Luhrs testified he was forewarned when Gurth called him to advise that she had not reviewed Hopper's prints because she was not then in town and he might want to "check it out." **Luhrs dep. 69-70, 88-89.** This call prompted him to review the prints prior to being hung. **Luhrs dep. 75-76.** He had not previously reviewed any submissions prior to their display. **Luhrs dep. 76.** Gurth denies this phone conversation took place. **Gurth dep. 59, 83-84.**

Hopper visited city hall during the second showing to get a feel for what would be appropriate. **Hopper dep. 71.** Observing nudity, she did not consider her work to be any more objectionable than what the City was then displaying. **Hopper dep. 71-72, 98.** Hopper told Edmonds her work contained nudity and Edmonds replied this would not be a problem. **Hopper dep. 86-87.**

Rupp was a sculptress. Her work survived on display for about a week, but complaints prompted Crutchfield to direct its removal on February 15, 1996. **Crutchfield dep. 58, 61.** Rupp had three pieces on display, and the one prompting the complaints was titled "To the Democrats, Republicans, and Bipartisans" and depicted a woman "mooning" her audience.[3] Rupp testified that Luhrs took a close look at her sculpture as she was placing

[3]The piece was also titled, at various times, "Damn, I'm Stuck" and "Woman Drinking from a Brook." **Rupp dep. 37-38; Luhrs dep. 56.**

it in the showcase and approved its placement. **Rupp dep. 19.** Luhrs agrees this occurred, but recalls "wincing" because he thought it was "right on the edge." **Luhrs dep. 56.** When complaints surfaced, Luhrs relayed them to Crutchfield who directed removal of the offending piece. It is disputed whether he directed removal of all three pieces, although only one had been the subject of complaints. **Rupp dep. 140-41.**

Some of the complaints centered on sexual explicitness.[4] **Crutchfield dep. 58-59.** Crutchfield was concerned that the controversy was interfering with the conduct of city business. **Crutchfield dep.**

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[4]City employee Margie Wilson, who lodged complaints, thought the work had an illusionist quality. It could be seen as a kneeling woman with outstretched arms. **Ex. 3.** It could also be seen as a man bent over a woman with the outstretched arms being those of a woman laying beneath him. **Wilson dep. 39.** According to Rupp, someone's imagination would have to "work overtime" to envision the piece in that light. **Rupp dep. 156.**

58. This was the first time the City rejected or removed an exhibit, although as indicated, there had been prior complaints and some of the art involved nudity..[5] **Gurth dep. 69-70; Hopper dep. 71-72; Luhrs dep. 64**. Crutchfield felt there was a line out there somewhere, and the Hopper/Rupp materials crossed it, notwithstanding that they might be perfectly acceptable in an art gallery. Crutchfield **dep. 52, 54.** According to Luhrs, "I was not crazy about taking people's artwork down. It was not my responsibility. It was the Mid Columbia Arts Council." **Luhrs dep.96.**

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[5]Proving that art is in the eye of the beholder, Gurth thought the nudity in the prior shows abstract and understated. **Gurth dep. 69-70.** Hopper thought it quite explicit. **Hopper dep. 71-72.** Crutchfield was not aware of it at all. **Crutchfield dep. 43, 48.** Luhrs was aware of some of it, although not the piece referred to by Gurth. **Luhrs dep. 64.** Luhrs did not recall any complaints based on nudity. **Id.**

It is undisputed that the City did not have public guidelines in place drawing the line between the acceptable and the unacceptable. **Luhrs dep. 124-26; Crutchfield dep. 73-75.**

Luhrs claims to have offered to display Hopper's prints on the second floor where traffic was lighter and she declined. **Luhrs dep. 116-17.** Hopper denies any such offer was made directly to her, but acknowledges that Luhrs made that suggestion at an Arts Council meeting. **Hopper dec.** Whether it was an offer or a suggestion, the same solution was not presented to Rupp. Luhrs did offer to allow her to replace the offending sculpture with a more suitable piece. **Luhrs dep. 117.**

Shortly thereafter, the City abandoned the arts program when controversy flared in the press and charges of censorship began flying. **Crutchfield dep. 112.** All artwork came down by March 29, 1996, prior to completion of the show as scheduled. **Ex. 78.** This action followed. Plaintiffs sued the Arts Council

for breach of contract and the City under the First and Fourteenth Amendments and 42 U.S.C. § 1983 and also for breach of contract. After the parties cross-moved for summary judgment, the Arts Council was dismissed pursuant to stipulation.

Analysis

(I) Cross-motions for summary judgment.

(A) Official policy: Municipal liability will be imposed only if the acts complained of are undertaken pursuant to official policy or custom. Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 690-91, 98 5. Ct. 2018, 2035-36 (1978). It is not necessary that the policy or custom be reduced to writing and formally enacted into law. It is enough that action be endorsed by a policy-maker, and acquiescence may be sufficient to ratify the subject "policy." J.B. v. Washington County, 127 F.3d 919, 923-24 (10th Cir. 1997), citing, Pembaur v. City of Cincinnati, 475 U.S. 469, 106 5. Ct. 1292 (1986).

The City argues that under its council/manager form of government, the city manager is limited to administrative functions and cannot create policy because only the city council can do that. It is undisputed that issues relative to the arts program were never formally placed before the council until litigation was imminent. The City contends it is entitled to such a ruling as a matter of law, but as a backup position urges that triable issues of fact preclude summary judgment in favor of plaintiffs.

The City cites a case on close point. Todd v. Smith, 305 S.C. 227, 407 S.E.2d 644 (1991), cert. denied, 502 U.S. 1059, 112 5. Ct. 938 (1992). As here, the defendant in Todd was a municipality which allowed a public building to be used to display art. As here, the city abdicated its role and allowed content regulation to be overseen by a private arts guild. Unlike here, the guild actually did regulate content and asked one exhibitor to remove a painting which some might find offensive. When the artist

declined, the city manager stepped in and directed closure of the entire exhibit.

Todd held the closure did not result from official policy because the city manager had no authority to promulgate policy. 305 S.C. at 230-31, 407 S.E.2d at 646-47. For reasons stated in the dissent, Todd is horrible law and inconsistent with Monell, supra, at least when read for this broad proposition. 305 S.C. at 232-35, 407 S.E.2d at 647-49 (Toal, J., dissenting). If a municipality can escape liability by simply not submitting an issue to its governing body, the manager would become a de facto policy maker by default. Read narrowly, however, Todd may be construed as standing for the proposition that under the facts before it, the single isolated act of the city manager did not rise to the level of a "policy."

The City urges this issue raises questions of fact because there is less than unanimity among the city council members as to the scope of Crutchfield's authority in initiating the arts program. That may be,

but need not be reached. Given the mode of disposition, it will be assumed for present purposes that the governing body of the City ratified Crutchfield's actions.

(B) City hall as a forum: The parties agree that the subject works are not obscene and thus entitled to First Amendment protection. The threshold from which all else flows is characterizing city hall as a forum of expression.

> The Supreme Court has recognized three types of forums, whose identification is necessary before undertaking a First Amendment analysis. The first type of forum is the traditional public forum, such as streets and parks, which "'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts

between citizens, and discussing public questions.'" The second type of forum is the designated or limited-use public forum, which "consists of public property which the State has opened for use by the public as a place for expressive activity." Finally, there is all remaining public property or the nonpublic forum. Regulation of traditional public forums and designated public forums is measured under a strict scrutiny standard, while regulation of nonpublic forums "need only be reasonable, so long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."

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Intern. Soc. for Krishna V. City of L.A., 966 F. Supp. 956, 959-60 (C.D. Cal. 1997) (citations omitted).[6]

Courts are reluctant to find public buildings to be public forums when operated in a proprietary manner. see, e.g., International Soc. for Krishna Consciousness v. Lee, 505 U.S. 672, 678, 112 5. Ct. 2701, 2705 (1992) (airport terminal nonpublic forum); Jacobsen v. Bonine, 123 F.3d 1272, 1274 (9th Cir. 1997) (interstate rest stop nonpublic forum); Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Serv., 812 F.2d 1194, 1198 (9th Cir. 1987) (post office and its environs nonpublic forum), cited with approval in United States V. Kokinda, 497 U.S. 720, 736, 110 5. Ct. 3115, 3125 (1990) (plurality); General

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[6]"Nonpublic forum" is oxymoronic. A forum is "an assembly, place, radio program, etc. for the discussion of public matters or current questions." Webster's New World Dictionary 531 (Third College Ed.). If a forum is not public, it is not a forum either. Nonetheless, the case law universally employs the term.

Media Communications, Inc. v. Cohen, 131 F.3d 273, 278-79 (2nd Cir. 1997) (military exchange nonpublic forum), pet. for cert. filed Mar 16, 1998; Berner v. Delahanty, 129 F.3d 20, 26 (1st Cir. 1997) (courthouse nonpublic forum), cert. denied, __ U.S. __, ___ S. Ct. ___, 1998 WL 38001 (Mar 23, 1998); Families Achieving Independence and Respect V. Nebraska Dept. of Social Services, 111 F.3d 1408, 1419-20 (8th Cir. 1997) (en banc) (lobby of welfare office nonpublic forum); Claudio V. United States, 836 F. Supp. 1219, 1224-25 (E.D. N.C. 1993) (federal building/post office/courthouse nonpublic forum), aff'd mem., 28 F.3d 1208 (4th Cir. 1994).

Simply arraying the authorities is not helpful because each of the above referenced facilities had discrete attributes and functions which led to its classification which are not necessarily relevant here. For example, a courthouse is nonpublic because of the need to maintain decorum and an aura of impartiality. Berner, supra, 129 F.2d at 26-27. An airport is nonpublic

because its purpose is to move travelers efficiently and the unbridled exercise of free speech would impair that mission. Lee, supra, 505 U.S. at 681-83, 112 5. Ct. at 2707-08. Rather than compare attributes, the safer course is to consider that a publicly-owned building does not become a public forum by accident.

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.

Tucker V. State of Cal. Dept. of Educ., 97 F.3d 1204, 1209 (9th Cir. 1996) (emphasis original), quoting, Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 802, 105 5. Ct. 3439, 3449 (1985).

Governmental intent is critical. "The '[m]ere physical characteristics of the property [do not] dictate forum analysis[.]' Rather, it is the 'location and purpose' of the property and the government's

subjective intent in having the property built and maintained, that is crucial to determining the nature of the property for forum analysis." Jacobsen, supra, 123 F.3d at 1274, quoting, Kokinda, supra, 497 U.S. at 728-30, 110 5. Ct. at 3120-21.

When a citizen enters city hall to attend a council meeting, the building is to that extent no doubt a designated public forum. When council meetings are in session, the building is being used to further a basic function of governance with limited citizen participation. But when someone enters city hall to pay a water bill, or secure a building permit, or the like, he or she is not interested in discourse, except to the extent required to attend to the business at hand. The record does not reflect that the City intentionally opened the gallery to the "public as a place for expressive activity." Krishna, supra, 966 F. Supp. at 960 (emphasis added). From the City's perspective, artist participation was by invitation only, and invitation was based on content. This is permissible.

Initially we note that government control over non-public fora includes:

> [t]he right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Monterey Cty., supra, 812 F.2d at 1198, quoting, Perry Educ. Ass'n V. Perry Local Educators' Ass'n, 460 U.S. 37, 49, 103 S. Ct. 948, 957 (1983); see also, General Media Communications, supra, 131 F.3d at

279 ("limitation on speech in a nonpublic forum may be content based" [emphasis original]).

The difficulty in analysis is that city officials delegated their authority to control the use to which city hall was put to a nongovernmental body and that body in turn: (1) failed to screen for content notwithstanding that it announced to everyone other than plaintiffs it would do so; (2) failed to advise plaintiffs that restraint was a requirement of participation; and (3) if plaintiffs are believed, affirmatively told them to the contrary. The issue becomes the extent to which the City's conveyance of authority to a non-governmental entity vitiates its own intent by default. Luhrs made it clear that "questionable" or "controversial" work was to be avoided. When it came to execution, however, the expectation of "invitation only" turned into a come-one-come-all affair; not because the City's intent had changed, but because for whatever reason, the Arts Council concededly did not follow through on its

announced intention to screen for suitability.

Plaintiff's strongest authority is Henderson V. City of Murfreesboro, Tenn., 960 F. Supp. 1292 (M.D. Tenn. 1997). On the surface, Henderson appears close on point. In that case, the rotunda of a city hall was used to display artwork. The city appointed a review committee which passed on artist's submissions in accord with defined criteria. The painting which gave rise to the case was approved and placed on display. A passer-by took offense at its sexual content and filed a complaint with the city attorney. When the city attorney was unable to locate the city manager, he personally removed the offending painting.

Henderson held that the city hall, or at least the portion containing the artwork, was a designated public forum. 960 F. Supp. at 1297-98. The Court reasoned that the exhibition was open to all who could satisfy the criteria, subject matter was not proscribed, and the rotunda was thus a place

designated for public discourse. Id. at 1299. Moreover, because most of the areas where city business was conducted were some distance from the rotunda, it did not qualify as a "workplace." Id. at 1298. City employees had access to the rotunda, but were not forced to be there.

If Henderson provides the applicable law, the City is in trouble. Restraints on expression in the limited forum context must be "narrowly drawn to effectuate a compelling state interest." Perry, supra, 460 U.S. at 46, 103 5. Ct. at 955. This will virtually always require an express public set of criteria establishing the lines. Cinevision Corp. V. City of Burbank, 745 F.2d 560, 571 (9th Cir. 1984), cert. denied, 471 U.S. 1054, 105 5. Ct. 2115 (1985). No public guidelines were in place here. Crutchfield's decisions were based on his own subjective perceptions and those of his employees. The decisions were ad hoc, and in the case of Rupp, made after her work was initially approved for display. There is no question but that

the City discriminated based on content. Luhrs said so in his letter to plaintiffs dated February 15, 1996. **EX. 14.**

However, Henderson is distinguishable in two respects. First, the city hall in this case is a workplace. The artwork was displayed on the corridor walls immediately inside the main entrance. Second, the defendant in Henderson evidenced a subjective intent to open up the rotunda as a place of public expression by operating just as one would expect a designated forum to be operated. Consistent with the case law, the city devised public criteria, and in applying the criteria approved the offending painting only to be later "overruled" by the city attorney. "An invitation to display original works of art with no restriction as to subject matter demonstrates the government's intent to open the Rotunda for the purpose of artistic expression within the guidelines of the art committee's criteria." 960 F. Supp. at 1299. The city in Henderson went into the

art business with its eyes open. The City in this case blundered into it with no appreciation of the magnitude of the undertaking or the legal pitfalls which inhere in such a project.

Plaintiffs have produced no evidence that either Crutchfield or Luhrs "intentionally open[ed] a nontraditional forum for public discourse." Tucker, supra, 97 F.3d at 1209. The only evidence of their intent is found in their deposition testimony and that reflects an intention to improve the ambience at city hall; not to promote free expression. The only two persons privy to the Luhrs/Gurth discussions agree that Luhrs was adamant that questionable and controversial work be avoided. Gurth passed that caveat on to participating artists except, it appears, to plaintiffs.

There are issues of fact as to who would exercise content control, but no issues over whether such regulation was contemplated. There are also issues of fact as to why the Arts Council would abandon its

announced intention to exercise content control. If resolution of these issues went to the City's intent, trial would be required. However, these issues do not go to intent, but at most, to the City's negligence in carrying out its intent. Negligence is not intent and a designated public forum is not "create[d] by inaction or by permitting limited discourse." Tucker, supra, 97 F.3d at 1209.

(C) Reasonableness of removing subject artwork: Because city hall was a nonpublic forum, speech regulation "need only satisfy the requirement of reasonableness." Lee, supra, 505 U.S. at 683, 112 5. Ct. at 2708. A "restriction need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Id. (emphasis original, internal quotation marks and citation omitted). Decisions have held that art which is merely offensive, and then only to certain groups, may be removed from a nonpublic forum for that reason alone. See Close V. Lederle, 424 F.2d 988, 990 n.2 (1st Cir.), cert.

denied, 400 U.S. 903, 91 5. Ct. 141 (1970). One decision has even held that art may be removed from a nonpublic forum simply because it is ugly. Serra V. U.S. General Services Admin., 847 F.2d 1045, 105,1 (2nd Cir. 1988). Other authorities draw a distinction between removing art (thereby suppressing it) and relocating it. "Relocation is not suppression, and if reasonable is not forbidden." Piarowski v. Illinois Community College, 759 F.2d 625, 630 (7th Cir.), cert. denied, 474 U.S. 1007, 106 5. Ct. 528 (1985).

Some 120 city employees work at city hall. **Crutchfield dep. 52.** They are a captive audience. Citizens tending to business with the City must visit city hall. They are a captive audience. Children use city hall, and not just because youngsters accompany their parents when tending to city business. The gymnasium in this former school building has been preserved as such, and is open to children for recreational use. **Crutchfield dep. 9-10, 51; Wilson dep. 10.** The presence of children standing alone is

reason enough to relocate or remove the artwork at issue. Board of Educ., Island Trees Etc. V. Pico, 457 U.S. 853, 871, 102 5. Ct. 2799, 2810 (1982) (plurality); FCC V. Pacifica Foundation, 438 U.S. 726, 749-50, 98 5. Ct. 3026, 3040-41 (1978); see also, Reno V. American Civil Liberties Union, ___ U.S. ___ 117 5. Ct. 2329, 2341-42 (1997) (distinguishing and re-affirming precedent while striking down the Communications Decency Act of 1996 as unconstitutional).

There appears to be much latitude in exercising content-based judgment in the nonpublic forum context, and considerable room for common sense. See generally, Piarowski, supra. The sensibilities of rejected artists might on occasion be offended, but no reason appears why their sensibilities should trump the sensibilities of hundreds of employees, citizens and other visitors who come to city hall and use it for the purpose for which it was intended. These folks have rights too, one of them being the right not to be

subjected to "assault upon individual privacy." Close, supra, 424 F.2d at 990, quoting, Redrup V. New York, 386 U.S. 767, 769, 87 5. Ct. 1414, 1415 (1967). "Freedom of speech must recognize, at least within limits, freedom not to listen." Id. at 991.

> In hyperconcern with his personal rights plaintiff would not only regard his interest in self-expression as more important then [sic] the interests of his unwilling audience, but asks us to add nearly three weeks of such exposure to the five days he has already received. With all respect for the district court, this is a case that should never have been brought.

Id.

There is a distinction between what an artist may create and exhibit free of governmental interference and what the government is required to exhibit on the artist's behalf. The City concedes the subject artwork

might be entirely appropriate if displayed in a setting where people come because they wish to view. However, the City objects to being placed in a situation where it must offend its citizens and employees, and in this contention, the City is in good company. No less stalwart a defender of the First Amendment than Justice Douglas had this to say on the topic.

> In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its

> vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.
>
> . . . . "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try not to listen." There is no difference when the message is visual, not auricular. In each the viewer or listener is captive.

Lehman v. City of Shaker Heights, 418 U.S. 298, 307, 94 5. Ct. 2714, 2719 (1974) (plurality) (Douglas,

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J., concurring) (citation omitted);[7] see also, Bland v. Fessler, 88 F.3d 729, 735 (9th Cir.) ("[Speakers have no right to turn people who are outside of their homes into a captive audience that is incapable of declining to receive a message") (citation and internal quotation marks omitted), cert. denied, ___ U.S. ___, 117 S. Ct. 513 (1996).

The presence of children standing alone would be enough to justify the City's actions. Pico, supra, 457 U.S. at 871, 102 S. Ct. at 2810; Pacifica, supra, 438 U.S. at 749-50, 98 S. Ct. at 3040-41. So would the need to protect the "captive audience that is incapable of declining to receive a message." Bland, supra, 88

[7]Plaintiffs dismiss this passage as just one man's opinion. Lehman was a plurality decision. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks V. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977) (citation and quotation marks omitted). Justice Douglas wrote the only concurrence.

F.3d at 735. So would the City's justifiable interest in maintaining the integrity of the workplace and avoiding the tension, aggravation, irritation and disruption that citizen and employee complaints would naturally generate. Taken in the aggregate, it is not surprising the City took the action it did. It would be surprising if it had not.

Plaintiffs contend that even if city hall was a nonpublic forum, the City still cannot engage in "viewpoint discrimination." This area is in a state of flux. The most recent word from the Ninth Circuit is Finley v. National Endowment for the Arts, 100 F.3d 671, 681-83 (9th Cir. 1996), rehearing and suggestion for rehearing en banc denied, 112 F.3d 1015 (9th Cir. 1997), cert. granted, ___ U.S. ___, 118 5. Ct. 554 (1997). As suggested by the subsequent history, the final word has yet to be written.

As recognized by Finley, a distinction must be drawn between public fora (or designated fora), and nonpublic fora. "[W]hen the government appropriates

public funds to establish a program it is entitled to define the limits of that program." Id. at 681, quoting, Rust v. Sullivan, 500 U.S. 173, 200, 111 5. Ct. 1759, 1776 (1991). Exceptions lie where an area constitutes a "traditional sphere of free expression" or "the government has declared its intention to 'encourage a diversity of views from private speakers.'" Id. at 681-82 (citations omitted). In those instances, viewpoint neutrality remains the rule. But neither is found here.

Moreover, "viewpoint" does not really fit these facts. There was no message conveyed. Hopper had no preconceived idea what she wished to communicate when she created her art. **Hopper dep. 116-17.** Art for art's sake enjoys First Amendment protection, but the City did not remove and/or decline to display the pieces because of plaintiffs' viewpoint. They were removed because regardless of an artist's viewpoint, bare rumps and cavorting nude couples are not family fare. The rule here is reasonableness, and

it was eminently reasonable to limit artwork to family fare.

(D) Contract issues: The parties agree the Arts Council acted as an agent. They disagree on who the principal was: the City or the plaintiffs. According to plaintiffs, the Arts Council was involved in a self-styled "partnership" with the City and represented the City in dealing with artists. So viewed, any agreement the Arts Council may have made with an artist in its capacity as agent for the City bound the City.

"Washington courts generally treat agency as a question of fact." Nordstrom Credit, Inc. v. Department of Revenue, 120 Wn.2d 935, 941, 845 P.2d 1331 (1993). If the inquiry ended there, trial would be required. However, the existence of an agency relationship has two levels of inquiry. The first is whether agent and principal came to a meeting of the minds as to the nature of their relationship. Id. There are issues of fact in this regard. The second

inquiry is whether the principal has the right to exercise control over the agent. Id. No issues appear in this regard.

While the parties appear to agree that the Arts Council was an agent, the Court does not concur. The City exercised no control over the procurement activities of the Arts Council. No one could have reasonably believed that signing a contract with the Arts Council gave rise to a contract with the City. The Arts Council was merely a supplier of services.

Finally, once a case satisfies the United Mine Workers v. Gibbs 383 U.S. 715, 86 S. Ct. 1130 (1966) requirement of deriving "from a common nucleus of operative fact" thus creating a single case or controversy, there are four statutory factors which might militate against exercising supplemental jurisdiction: (1) if the state claims are novel or complex; (2) if the state claims substantially predominate; (3) if all federal claims have been dismissed; and (4) if exceptional circumstances exist.

28 U.S.C. § 1367(c). A court is not automatically divested of jurisdiction if the underlying federal claims are dismissed. Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995). Where all federal claims have been dismissed prior to trial, a court "should" dismiss pendent state claims, although "should" does not mean "must." Acri v. Varian Associates, Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (en banc). Dismissal is not done mechanically, but "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state law claims." Id. at 1001 (citation omitted).

The contract phase of this action presents novel questions about how (and whether) municipal liability can attach on a pass-through theory when a contract to which the municipality is not a party fails. Comity militates in favor of these questions being answered in state court. It will cost the parties no more to try the action in state court than it would here.

(II) Plaintiffs' motion to strike portions of the City's statement of fact: Plaintiff asserts the City's LR 56.1 statement is rife with hearsay. As is usually the case in such contests, the easy answer is that the Court recognizes hearsay when it sees it and mentally casts it aside.

(III) City's motion to strike portions of Rupp's deposition testimony: Rupp believes her reputation has been harmed based on what others have told her. The answer to this motion is the same as to plaintiffs' motion to strike. Moreover, because of the disposition, the issue of damages will not be reached.

(IV) City's motion to allow late disclosure of an expert witness: Gurth has been a known fact witness all along and has been deposed as such. The City now wishes to disclose her as an expert. Presumably, the City wishes to use her as in its damages case because Gurth was emphatic that plaintiffs would suffer no reputational injury as a result of the events. She also thought it improbable that either artist spent

much time or effort in preparing her exhibit. Because the matter will not proceed to trial, the motion is moot.

(5) Parties' motions to file an overlength brief and to shorten time: Both opening briefs share the same characteristic. They are overlength only because each restates the factual presentation already set out in the LR 56.1 statement.

IT IS HEREBY ORDERED:

(1) Defendant's motion for summary judgment (**Ct. Rec. 33**) is GRANTED. Dismissal of the federal claims is with prejudice. Dismissal of the contract claim is without prejudice.

(2) Plaintiffs' motion to strike (**Ct. Rec. 41**) is GRANTED in part and DENIED in part in that to the extent the Court has relied on the materials objected to, it has only been for permissible purposes.

(3) Plaintiffs' cross-motion for partial summary judgment (**Ct. Rec. 44**) is DENIED.

(4) Plaintiffs' motion to file an overlength brief (**Ct. Rec. 51**) is GRANTED.

(5) Plaintiffs' motion to shorten time (**Ct. Rec. 53**) is DENIED as moot.

(6) Defendant's motion to file an overlength brief (**Ct. Rec. 57**) is GRANTED.

(7) Defendant's motion to allow disclosure of an expert witness (**Ct. Rec. 59**) is DENIED as moot.

(8) Defendant's motion to strike deposition testimony (**Ct. Rec. 72**) is DENIED as moot.

IT IS SO ORDERED. The District Executive is hereby directed to enter this Order, enter judgment thereon, furnish copies to counsel, and close this file.

DATED this 30th day of March 1998.

/s/_____

FRED VAN SICKLE

United States District Judge